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

Prishtina, 31 May 2021
No.ref.:AGJ 1789/21

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JUDGMENT

in

case no. KI195/19

Applicant

Banka për Biznes

Constitutional review of Decision Ae. No. 287/18 of the Court of Appeals of 27 May 2019 and Decision I.EK. No. 330/2019 of the Basic Court in Prishtina, Department for Commercial Matters, of 1 August 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 Banka për Biznes J.S.C. (hereinafter: the Bank), represented with power of attorney by Sahit Bajraktari (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) in conjunction with the Decision [I.EK. No. 330/2019] of 1 August 2019 of the Department for Commercial Matters of the Basic Court in Prishtina (hereinafter: the Basic Court).

3. The Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals, was served on the Applicant on 25 June 2019.

Subject matter

4. The subject matter is the constitutional review of the challenged Decisions, which have allegedly been rendered in violation of fundamental rights and freedoms of the Applicant guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [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 Court

6. On 24 October 2019, the Applicant submitted the Referral by mail service to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 31 October 2019, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Bajram Ljatifi and Radomir Laban.

8. On 20 January 2020, the Court notified the Applicant's representative about the registration of the Referral and requested him to submit the power of attorney to the Court.

9. On 28 January 2020, the Applicant's representative submitted to the Court the requested power of attorney.

10. On 29 January 2020, the Court notified the Court of Appeals as well as the interested party, namely, N.T.N. "Nita Commerc" with headquarters in the Municipality of Malisheva (hereinafter: "Nita Commerc") about the registration of the Referral. The latter was given the opportunity to comment on the Applicant's Referral. On the same date, the Court notified the Basic Court about the registration of the Referral and requested it to submit to the Court the complete case file.

11. On 7 February 2020, "Nita Commerc" submitted to the Court the relevant comments regarding the case.

12. On 9 February 2021, the Court requested the Basic Court to inform the Court at what stage is the review of the Applicant's case before the Basic Court.

13. On 12 February 2020, the Basic Court submitted the complete case file to the Court.

14. On 16 February 2021, the Basic Court notified the Court that in relation to the case, it decided by Judgment [I.Ek. No. 330/2019] of 30 June 2020 and that the review of the latter is before the Court of Appeals according to the appeal of "Nita Commerc". The Basic Court in its response stated that for more information, the Court should address the Court of Appeals.

15. On 22 February 2021, the Court requested the Court of Appeals to inform the Court at what stage is the review of the case and to submit to the Court the Judgment [I. Ek. No. 330/19] of 30 June 2020 of the Basic Court.

16. On 24 February 2021, the Court of Appeals submitted the answer to the Court, through which it notified that the case is pending before the Court of Appeals and is registered with the number [Ae. 146/2020]. Subsequently, regarding the specific request of the Court to submit the Judgment [I. Ek. No. 330/19] of 30 June 2020 of the Basic Court, the Court of Appeals specified that this Judgment is attached to this response. However, based on the documentation submitted by the Court of Appeals, the aforementioned Judgment [I. Ek. No. 330/19] of 30 June 2020 of the Basic Court did not appear to be attached to its response.

17. On 24 February 2021, the Court by e-mail requested the Court of Appeals to submit to the Court the Judgment [I. Ek. No. 330/19] of 30 June 2020 of the Basic Court.

18. On 26 February 2021, the Court of Appeals submitted by e-mail to the Court the abovementioned Judgment, namely the Judgment [I. Ek. No. 330/19] of 30 June 2020 of the Basic Court.

19. On 12 April 2021, the Review Panel considered the report of the Judge Rapporteur and decided to postpone the decision on this case to another session.

20. On 5 May 2021, the Review Panel considered the Report of the Judge Rapporteur, and unanimously recommended to the Court the admissibility of the Referral.

21. On the same date, the Court unanimously found that (i) the Referral is admissible; and found that (ii) the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals and the Decision [I. Ek. No. 330/19] of 1 August 2019 of the Basic Court are not in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

Summary of facts

22. It appears from the case file that the Applicant and "Nita Commerc" were litigating parties in three contested proceedings which the Court will present below.

(i) The first contested procedure related to the certification of debt, the second contested procedure and the enforcement procedure

23. On 2 July 2003, the Applicant and "Nita Commerc" entered into a Loan Agreement [no. 2/5 LI 582] (hereinafter: the Loan Agreement), in the amount of 269,800 euro, with an annual interest of fourteen percent (14%), with the obligation to return the loan within twelve (12) months. Based on the case file, the purpose of the loan was "*payment of customs duties and other payments*" set out in the aforementioned Contract.

24. On the same date, to secure the obligations arising from the Loan Agreement, the parties also signed the Collateral Agreement [no. 336/02] (hereinafter: the Collateral Agreement), based on which, "Nita Commerc" had mortgaged the immovable property registered in the abovementioned contract, in the amount of 597,000 euro.

25. On 14 July 2006, due to the non-payment of the loan debt in full, the Bank filed a lawsuit against "Nita Commerc" with the District Commercial Court in Prishtina (hereinafter: the Commercial District Court) for the remaining part of the debt, namely (i) debt in the amount of 150,000 euro; and (ii) the contracted interest in the amount of 1,993.73 euro and from that date until the final payment, the contracted annual interest in the amount of fourteen percent (14%) on the principal debt base. The Bank also filed lawsuits against the companies N.T.N "Mazreku" and N.T.T "Global Petrol" from the Municipality of Malisheva, in the capacity of loan guarantors for the respective "Nita Commerc".

26. On 30 October 2006, the District Commercial Court was handed over the financial expertise prepared by the expert Sh.M., on the basis of which it was concluded that the debt of "Nita Commerc" to the Bank amounted to 199,230 euro.

27. On 23 November 2006, the Applicant, namely the Bank, addressed the District Commercial Court with a request to withdraw the lawsuit against the companies N.T.N "Mazreku" and N.T.T "Global Petrol", respectively.

28. On 23 November 2006, the District Commercial Court, by the Judgment [VIII. C. No. 207/06], approved the statement of claim of the Bank. By this Judgment, the above-mentioned court, among others, held that the respondent, namely "Nita Commerc" be obliged to pay (i) the main debt on behalf of the loan in the amount of 150,000 euro; (ii) the contracted interest in the amount of 1,993.73 euro until 28 July 2006, and from the same date until the final payment, the contracted interest on the principal debt in the amount of fourteen percent (14%) per year; and (iii) costs of the contested procedure in the amount of 1,500 euro. The abovementioned judgment also stated, *inter alia*, that (i) the allegations of "Nita Commerc" that it had paid the amount of 74,343.00 euro twice due to "*unauthorized interference with his account*" of the Bank employees, based on the evidence before the court and the financial expertise of 30 October 2006, are not grounded, and based on this expertise it was concluded that *" it is not about double payments but about a payment made continuously"*; and (ii) the statement of claim against other parties, namely N.T.N "Mazreku" and N.T.T "Global Petrol", is considered withdrawn.

29. On an unspecified date, "Nita Commerc" filed an appeal with the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) against the above-

mentioned Judgment of the District Commercial Court, alleging essential violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law.

30. On 17 September 2009, the Supreme Court by the Judgment [Ae. No. 2/2007] rejected as ungrounded the appeal of "Nita Commerc" and upheld the Judgment [VIII. C. No. 207 /06] of 23 November 2006 of the Commercial District Court.

31. On 30 October 2009, the Applicant submitted a proposal for enforcement under the Collateral Agreement against ""Nita Commerc". On 11 November 2009, the Municipal Court in Malisheva (hereinafter: the Municipal Court), by the Decision [E. No. 406/09], allowed the enforcement.

32. On an unspecified date, "Nita Commerc" also filed a revision with the Supreme Court against the Judgment [Ae. No. 2/2007] of 17 September 2009 of the Supreme Court, alleging essential violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law.

33. On 31 December 2009, "Nita Commerc" also filed a new lawsuit with the District Commercial Court against the Applicant regarding the payment of the debt in the amount of 74,360 euro "*due to unfounded gain*", referring to Article 210 (Acquiring without ground) of the Law of Obligations of 1978 (hereinafter: the old LOR). On the other hand, the Applicant through the response to the lawsuit stated that this issue presents "*adjudicated matter",* based on the Judgment of the same court, namely the Judgment [VIII. C. Nr. 207/06] of 23 November 2006 of the District Commercial Court, and upheld in the meantime also by the Judgment [Ae. No. 2/2007] of 17 September 2009 of the Supreme Court.

34. On 17 March 2010, the Supreme Court by the Judgment [Rev. E. No. 20/2009] rejected as ungrounded the revision of "Nita Commerc" and upheld the Judgment [Ae. No. 2/2007] of 17 September 2009 of the Supreme Court in conjunction with the Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court.

35. On 12 May 2010, the District Commercial Court, acting on the lawsuit of 31 December 2009 of "Nita Commerc", by the Decision [IV. C. No. 1/2010] dismissed the latter, based on Articles 391 [no title] and 393 [no title] of Law No. 03/L-006 on Contested Procedure (hereinafter: LCP). The first, namely Article 391, point d) thereof, stipulates that the lawsuit is dismissed as inadmissible when the case is an "*adjudicated matter*". The District Commercial Court in this Judgment, among others, also reasoned that by the Judgment [C. No. 207/2006] of 23 November 2006, it also examined the allegation "Nita Commerc" regarding "*the payment made twice in the amount of 74,360 euro*", rejecting the latter as ungrounded, a finding that was also upheld by the Supreme Court by its two Judgments, Judgment [Ae. No. 2/2007] of 17 September 2009 and Judgment [Rev. E. No. 20/2009] of 17 March 2010.

36. On 26 July 2013, based on the Decision [E. No. 406/09] of 11 November 2009 of the Municipal Court by which the enforcement was allowed based on the Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court and subsequently upheld by the Supreme Court by its two Judgments mentioned above,

the execution of the enforcement procedure regarding the mortgage that was pledged for securing the loan by "Nita Commerc" was completed.

(i) Criminal proceedings and third contested proceedings

37. In May 2010, "Nita Commerc" initiated two further proceedings. Initially, on 17 May 2010, "Nita Commerc" filed a criminal report with the Basic Prosecution in Prishtina (hereinafter: the Basic Prosecution), against the Director of the Bank, namely I.Z., and the employees of the Bank, A.Sh., M.B., and Sh.K., , claiming that from the account of "Nita Commerc", without authorization have withdrawn the amount of 79,786,00 euro, and "*which they did not register but kept to themselves*". Whereas, on 19 May 2010, "Nita-Commerc", also filed a lawsuit with the Municipal Court, requesting "*not to allow the execution*" of the Decision [E. No. 406/09] of 11 November 2009 of the Municipal Court and which had allowed the enforcement regarding the first contested procedure, repeating the allegations presented in the criminal report and emphasizing the fact that the respective employees of the Bank, respectively A.Sh., M.B., and Sh.K., "*have unlawfully withdrawn the amount of 74,000 euro from his account*". On the other hand, the Applicant, namely the Bank, through the response to the lawsuit, challenged the lawsuit as ungrounded, reiterating the fact that the cases raised by "Nita Commerc", constitute "*adjudicated matter"*, because it was already reviewed and decided by the final decisions of the regular courts.

38. On 4 June 2013, based on the above mentioned criminal report, the Department for Serious Crimes of the Basic Prosecution, by the Decision to initiate investigations, namely the Decision [PP. 567/2013], found that against the defendants A.Sh., M.B. and Sh.K., should initiate investigations, as "*there is a reasonable suspicion that they have committed a criminal offense*" of embezzlement during the exercise of duty, as established in paragraph 3 of Article 340 (Misappropriation in office) in conjunction with paragraph 1 of Article 23 (Co-perpetration) of the Provisional Criminal Code of Kosovo no. 2003/25 (hereinafter: PCCK).

39. Whereas, on 13 September 2013, "Nita Commerc" filed a submission with the Branch in Malisheva of the Basic Court in Gjakova, requesting the modification of the statement of claim of 19 May 2010. The latter, as explained above, was originally filed as lawsuit to "*not allow the execution*", while "Nita Commerc" requested that the latter be modified to a lawsuit for compensation of damage based on Article 259 [no title] of the LCP. Based on the case file, it results that the compensation of the damage requested by "Nita Commerc" is in the amount of 98,019.43 euro.

40. On 20 June 2014, the Branch in Malisheva of the Basic Court in Gjakova by the Decision [C. No. 62/10] was declared incompetent because of the lack of subject matter jurisdiction to decide on this issue and referred the case to the Basic Court in Prishtina.

41. On 14 July 2015, the Basic Court, by the Decision that is part of the minutes from the main trial session, decided to terminate the contested procedure related to this case, until the criminal case is decided [PP. I. 567/13].

42. On 5 December 2015, the Basic Prosecution in Ferizaj filed the Indictment [PP. l. No. 111/20 J 5], against the accused A.Sh. and M.B., on the grounded suspicion that they

have committed the criminal offense of "*misappropriation in office*" as provided in paragraph 3 of Article 340 in conjunction with paragraph 1 of Article 23 of the PCCK. Based on the case file, in the hearings held during February and March 2016, the State Prosecutor, modified the Indictment, withdrawing from the Indictment the accused M.B.

43. On 31 March 2016, the Department for Serious Crimes of the Basic Court, by the Judgment [PKR. no. 209/2015] acquitted the person A.Sh. of charges, while in the realization of the legal property claim had instructed "Nita Commerc" to a civil dispute. Based on the case file, this Judgment was confirmed by the Judgment [PAKR. No. 392/16] of 15 March 2017 of the Court of Appeals.

44. On 14 September 2016, the Basic Court by the Decision, which is part of the minutes from the main trial session, decided to continue the contested procedure terminated by the Decision of 14 July 2015.

45. On 17 October 2016, the Basic Court, by the Decision [I. C. No. 424/2014], appointed expert F.K., to do the financial expertise to assess whether there was unauthorized interference by the Bank in the account of "Nita Commerc", in the amount of (i) 74,089.37 euros; and (ii) 23,930.06 euro as "*funds not included in the statement of accounts*", and consequently at a total amount of 98,019.93 euro. The Bank demanded that lawsuit of "Nita Commerc" be dismissed as inadmissible, claiming again that in this case we are dealing with "*adjudicated matter*".

46. On 24 November 2016, the financial expert report finished by F.K. was submitted to the Basic Court, which found, among other things, that (i) " *payments made in the name of customs duties (8 transactions in the amount of 74,306 euro) did not affect the company "Nita Commerc" and there was no duplication of banking operations*"; and (ii) regarding the other allegation of the party that he was damaged in the amount of 23,930.06 euro, "*the amount of 1,610 euro relates to the provisions in the name of permitted loans, while the amount of 1,455 was initially registered to the detriment of the client, but later, the bank finished the proper reversal",* whereas "*the remaining amount of 20,837.90 euro represents the client's credit obligations to the bank and for that the court has rendered a decision*".

47. On 26 January 2017, based on the minutes of the Basic Court, the latter, by the Decision [I. C. No. 424/2014], approved the proposal for issuing another expertise, by a group of three experts from the Faculty of Economics of the University of Prishtina (hereinafter: the Faculty of Economics) regarding the disputed value of 74,000 euro. However, considering that the relevant expertise was not submitted, on 26 March 2018, the Basic Court by the Kosovo Police ordered the Faculty of Economics to return the case file. The relevant case file, consequently, was submitted to the Basic Court, but not the financial expertise, which according to the reasoning of the Faculty of Economics could not be worked because "*the parties did not respond to the submission of evidence*". Considering this, on 11 April 2018, the Basic Court by the Decision [I. EK. No. 424/14] imposed a fine on the group of three experts of the Faculty of Economics because (i) the respective group has kept the original case file for more than one (1) year despite the fact that the relevant court has set a deadline of thirty (30) days for the submission of the expertise report; moreover that (ii) the relevant group has not submitted the expertise report at all.

48. On 2 November 2018, the Basic Court, by the Decision [I.E.K. No. 424/14] dismissed the lawsuit of "Nita Commerc". In this Decision, among other things, it is stated that regardless of the amount of value claimed with the new lawsuit, (i) the subject of the statement of claim is the same; (ii) allegations for the amount claimed are based on the same facts and on the same basis; and (iii) the parties in the trial are the same, therefore the Basic Court, by the abovementioned Decision, found that the request meets the requirements to be considered as an "*adjudicated matter*", based on Article 391 of the LCP.

49. On 22 November 2018, against the abovementioned Decision of the Basic Court, "Nita Commerc" filed an appeal with the Court of Appeals, alleging essential violation of the provisions of the contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law. On the other hand, the Applicant through the response to the appeal proposed that the appeal be rejected as ungrounded and the case be addressed as "*adjudicated matter*".

50. On 27 May 2019, the Court of Appeals by the Decision [Ae. No. 287/18], approved as grounded the appeal of "Nita Commerc", annulling the Decision [I. EK. No. 424/14] of 2 November 2018 of the Basic Court and remanded the case to the first instance for retrial. The Court of Appeals, in the reasoning of this finding, stated that the challenged Decision was rendered in violation of paragraph 1 of Article 182 [no title] in conjunction with point d) of paragraph 1 of Article 391 of the LCP, because (i) the position of the parties in the procedure is different, as is the legal basis and the value of the dispute; and (ii) the issue of debt payment has been adjudicated, and now the subject of the dispute is the compensation of the damage "i*t is alleged that the respondent, namely its officials, caused the damage to the claimant by misappropriating money from its bank account, in an unlawful manner and against whom criminal investigations have been initiated*".

51. On an unspecified date, against the above-mentioned Decision of the Court of Appeals, the Applicant submitted a letter to the Basic Court, requesting the dismissal of the lawsuit of "Nita Commerc", as this contested case is an "*adjudicated matter*".

52. On 1 August 2019, the Basic Court, by the Decision [I.EK. No. 330/19] rejected the Applicant's request that the disputed case be considered as an "*adjudicated matter*" and decided that based on the recommendations given by the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals, the procedure be continued with a review of the merits of the statement of claim. No appeal was allowed against this Decision.

53. On 23 September 2019, referring to point b) of paragraph 1 of Article 245 [no title] of the LCP, the Applicant addressed the Office of the State Prosecutor with a proposal to initiate a request for protection of legality against the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals.

54. On 3 October 2019, the State Prosecutor's Office, by the Notification [KMLC. No. 158/2019] notified the Applicant that his Referral was not approved, because there is no sufficient legal basis based on points a) and b) of paragraph 1 of Article 247 [no title] of the LCP.

(i) The procedure after the Applicant has submitted his Referral to the Court requesting the constitutional review of the challenged Decisions

55. On 23 October 2019, the Basic Court, by the Decision [I.EK No. 424/2014] also appointed a financial super-expertise related to the dispute between the parties, namely the disputed amount of 74,000 euro, appointing three financial experts, namely R.A., A.Z. and M.M., for the preparation of super-expertise.

56. On 14 November 2019, the aforementioned financial experts submitted to the Basic Court "*super financial expertise*", which, *inter alia*, found that (i) the subject "Nita Commerc" was not harmed; (ii) " *there was no interference of bank employees in the bank account of the entity Nita Commerc" without power of attorney, but that all withdrawals and payments of their client's obligation to Kosovo Customs have been made in accordance with Article 4 of the Suzerain Loan No. 2/5-582 of 02.07.2003* [...]"; and (iii) it does not appear to have had double payments.

57. On 30 June 2020, the Basic Court, by the Judgment [I.EK. No. 330/19] rejected as ungrounded the statement of claim of "Nita Commerc". The Basic Court in its reasoning, *inter alia*, stated that based on Article 154 (Foundations of Liability) of the old LOR is stipulated that whoever causes injury to another shall be liable to reddres it, unless he proves that the damage was caused without his fault and in this case, none of the claims of "Nita Commerc" regarding the allegation that "*the respondent misused the claimant;s funds from his account by withdrawing funds from his account without authorization"*, has not been proved before the Basic Court.

58. Based on the case file, it appears that "Nita Commerc" filed an appeal against the above-mentioned Judgment of the Basic Court with the Court of Appeals. Based on the response of the Basic Court and that of the Court of Appeals submitted to the Court on 16 February 2021 and 24 February 2021, respectively, the above-mentioned appeal of "Nita Commerc" is pending before the Court of Appeals.

Applicant's allegations

59. The Applicant alleges that the challenged Decisions, namely the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals and the the Decision [I.EK. No. 330/19] of 1 August 2019 of the Basic Court, have been rendered in violation of its fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR. The Applicant challenges the above-mentioned Decisions alleging violation of the above-mentioned Articles of the Constitution and the ECHR, due to (i) violation of the principle of legal certainty; and (ii) lack of reasoning of the court decision.

(i) Regarding allegations of violation of the principle of legal certainty

60. The Applicant, in this context, alleges that the Court of Appeals, by the challenged Decision, reopened a final decision, namely Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court, contrary to the constitutional guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR. The Applicant states that the principle of legal certainty is one of the main aspects of the rule of law, which, among other things, presupposes the observance of

the principle *res judicata*, which is the principle of final form of court decisions. In the context of a violation of this principle, the Applicant states, *inter alia*, that (i) notwithstanding Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court; two Judgments of the Supreme Court, the Judgment [Ae. No. 2/2007] of 17 September 2009 and the Judgment [Rev E. No. 20/2009] of 17 March 2010; Decision [IV. C. No. 1/2010] of 12 May 2010 of the District Commercial Court; and Decision [I.EK. No. 424 / 14] of 2 November 2018 of the Basic Court, the Court of Appeals and then the Basic Court, by the challenged Decisions, more than (9) years later, have reopened a court process, considering that it is not an "*adjudicated matter*"; (ii) the appeal before the Court of Appeals, on the basis of which it has reopened a trial which was previously qualified by the regular courts as *res judicata*, relates to the same case, the same factual situation, the same parties and the same legal report which had already been decided by the regular courts; (iii) the allegation of "Nita Commerc", on the basis of which has filed a new lawsuit and on the basis of which the Court of Appeals, by the challenged Decision has reopened an "*adjudicated matter"*, has been reviewed since the beginning of this trial, respectively in 2006, being dismissed by the District Commercial Court, by the Judgment [VIII. C. No. 207/06] of 23 November 2006, as ungrounded, a finding which was subsequently confirmed twice more by the Supreme Court; (iv) in the opening of a case *res judicata*, the Court of Appeals is also contrary to the case law of the Supreme Court, reflected in the third volume of the Bulletin of Case Law of the Supreme Court of 2016, according to which, in order to be considered a *res judicata*, there must be an identity, namely the subjective identity of the parties, there must be an identity of the claim, there must be an identity of factual situation and the dispute has been developed and concluded in a contested procedure, the requirements which are met in the circumstances of the case; and (v) contrary to the constitutional guarantees and the case law of the Court, a court and final decision, namely Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court, has remained ineffective, to the detriment of the Applicant, thus resulting in "*illusory*" constitutional rights for the latter.

61. In support of its allegations of violation of legal certainty, the Applicant refers to the case law of (i) the Court in the following cases: KI08/09, Applicant, *Independent Trade Union of Steel Pipe Factory Employees - IMK from Ferizaj*, Judgment of 17 December 2010 (hereinafter: the case of Court KI08/09); KI132/15, Applicant *Deçani Monastery*, Judgment of 20 May 2016 (hereinafter: the case of Court KI132/15); KI122/17, Applicant *Česká Exportni Banka A.S*, Judgment of 18 April 2018 (hereinafter: the case of Court KI122/17); KI87/18, Applicant *Insurance Company "IF Skadeforsikring",* Judgment of 27 February 2019 (hereinafter: the case of Court KI87/18); and (ii) the European Court of Human Rights (hereinafter: the ECtHR) in the case *Ponomaryov v. Ukraine*, Judgment of 3 April 2008.

(i) With respect to allegations of lack of reasoning of the court decision

62. The Applicant, in this context, alleges that the Basic Court and the Court of Appeals, by the challenged Decisions, failed to justify their decision-making and to address and justify the Applicant's substantive allegations, contrary to the constitutional guarantees, embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR. The Applicant, referring to the case law of the Court in the context of a reasoned court decision, states that the regular courts are obliged to address the substantive allegations of the respective parties and to indicate with sufficient clarity

the reasons on which they based their decision-making, while acting contrary to the constitutional guarantees of a reasoned court decision, if they provide no answer as to the substantive allegations of the parties.

63. The Applicant more specifically states that (i) Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals does not contain any reference or reasoning regarding its allegations that by the Decision [IV. C. No. 1/2010] of 12 May 2010 of the District Commercial Court, the lawsuit of "Nita Commerc" was dismissed as *res judicata*; whereas (ii) the Decision [I.EK. No. 330/19] of 1 August 2019 of the Basic Court, also did not address any of its allegations, but for the reopening of a contested procedure contrary to the constitutional guarantees and those of the ECHR with regard to the principle of legal certainty, was satisfied with the finding that "*this is what the Court of Appeals has determined*".

64. In support of its allegations of violation of the right to a reasoned court decision, the Applicant refers to the case law of the Court, in the following cases: KI24/17, Applicant *Bedri Salihu*, Judgment of 27 May 2019 (hereinafter: the case of Court KI24/17); KI138/ 5, Applicant "*Sharr Beteiligungs GmbH*" L.L.C., Judgment of 4 September 2017 (hereinafter: the case of Court KI138/15); KI72/12, Applicants *Veton Berisha and Ilfete Haziri*, Judgment of 5 December 2012 (hereinafter: the case of Court KI72/12); and the case of the Court KI122/17.

65. Finally, the Applicant requests the Court to (i) declare the Referral admissible; (ii) find that there has been a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR; (iii) find that the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals and Decision [I.EK. No. 330/19] of 1 August 2019 of the Basic Court are invalid; and (iv) remand the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals for retrial before the Court of Appeals "*in accordance with the Judgment of the Constitutional Court*".

Comments of "Nita Commerc"

66. Through its response to the Court submitted on 7 February 2020, "Nita Commerc" challenged the Applicant's allegations. Initially, "Nita Commerc" stated that the Applicant has not exhausted the legal remedies provided by law. In this context, the latter stated that "*although by Decision I.EK. no. 330/19 of the Basic Court-Department for Commercial Matters of 1 August 2020 is not allowed a special appeal against this decision, the Applicant has the right to appeal for the same issue against the decision by which the proceedings of the case in the court of first instance ends, as in relation to the present case the contested procedure has not ended in the first instance before the competent court, this is also confirmed by point 2 of the enacting clause of this Decision [...]".*

67. As regards the merits of the case, "Nita-Commerc" (i) refers to Judgment [PKR. No. 209/2015] of 31 March 2016 of the Basic Court by which the latter for the realization of the property claim was instructed to a civil dispute; and (ii) states that the Court of Appeals has rightly found that we are not dealing with "*adjudicated matter",* because *"in the present case the position of the parties in the procedure is different (where in this case we are as claiming party) and the value of the dispute is different from that of Judgment VIII. C. No. 207/06 of the District Commercial Court in Prishtina of 23.11.2006".*

Admissibility of the Referral

68. The Court first examines whether the admissibility requirements established by the Constitution, foreseen by the Law and further specified by the Rules of Procedure have been met.

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

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
> *[...]*
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".*

70. The Court also refer to paragraph 4 of Article 21 [General Principles] of the Constitution, which establishes:

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

71. In this regard, the Court 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, *inter alia*, case of Court KI118/18, with Applicants, *Eco Construction l.l.c.*, Resolution on Inadmissibility, of 10 October 2019, paragraph 29 and the references used therein).

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

> 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 […].”

73. As regards the fulfillment of these requirements, the Court finds that the Applicant filed the Referral in the capacity of an authorized party, challenging two acts of the public authority, namely (i) Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals; and (ii) Decision [I.EK. No. 330/19] of 1 August 2019 of the Basic Court. Regarding the two challenged decisions, the Applicant also clarified the rights and freedoms he claims to have been violated in accordance with the requirements of Article 48 of the Law, and submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

74. However, in addition the Court will assess whether the Applicant has met the criterion of exhaustion of legal remedies provided by law, as required by paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and point (b) of paragraph (1) of Rule 39 (Admissibility Criteria) of the Rules of Procedure. The Court will assess the fulfillment of this criterion separately in relation to the two challenged acts, starting with the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals, to continue with the Decision [I.EK. nr. 330/19] of 1 August 2019 of the Basic Court.

75. The Court will make this assessment based on the general principles regarding the exhaustion of legal remedies, as elaborated through the case law of the ECtHR and the Court. The latter has elaborated on these principles in detail in a number of cases, including but not limited to cases Kll08/18, Applicant *Blerta Morina*, Resolution on Inadmissibility, of 30 September 2019, KI108/18); KI147/18, Applicant *Artan Hadri*, Resolution on Inadmissibility, of 11 October 2019, KI147/18); KI211/19, Applicants *Hashim Gashi, Selajdin Isufi, B.K., H.Z., M.H., R.S., R.E., S.O., S.H., H.I., N.S., S.l., and S.R*, Resolution on Inadmissibility, of 11 November 2020; KI43/20, Applicant *Fitore Sadikaj*, Resolution on Inadmissibility, of 31 August 2020, KI43/20); and KI42/20, Applicant *Armend Hamiti*, Resolution on Inadmissibility, of 31 August 2020.

(i) Regarding the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals

76. The Court recalls that the above-mentioned Decision of the Court of Appeals was rendered based on the appeal of “Nita Commerc” against the Decision [I.EK. No 424/14] of 2 November 2018 of the Basic Court, which rejected the lawsuit of the latter on the basis of point d) of paragraph 1 of Article 391 of the LCP, qualifying this case as *res judicata*. The Court of Appeals annulled this Decision of the Basic Court, considering that the case before it could not qualify as *res judicata* and remanding the case to the Basic Court for reconsideration regarding the merits of the case. Against the Decision of the Court of Appeals, the Applicant submitted a request for protection of legality to the State Prosecutor’s Office, but the latter by the Notification [KMLC. No. 158/2019] of 3 October 2019, rejected the same.

77. The Court notes that based on the case law of the Court, the decisions of the Court of Appeals can be challenged before the Court, and the latter has consistently assessed that the legal remedies have been exhausted by the respective Applicants who have challenged the decisions of the Court of Appeals. This case law has been built by the

Court based on the case law of the ECtHR, according to which, among others, the respective Applicants are unconditionally obliged to use extraordinary legal remedies. (See ECtHR Practical Guide on Admissibility Criteria of 30 April 2020; I. Procedural grounds for inadmissibility; A. Non-exhaustion of domestic remedies; 2. Application of the rule; e) Existence and appropriateness, paragraph 89 and references used therein). Furthermore, based on the same case law, in the event of the existence of more than one effective legal remedy, it is sufficient for an Applicant to have used one of them. (See, ECtHR Practical Guide on Admissibility Criteria of 30 April 2020; I. Procedural grounds for inadmissibility; A. Non-exhaustion of domestic remedies; 2. Application of the rule; c) Existence of several remedies; paragraph 86 and references used therein). The Court recalls that in the circumstances of the present case, against the challenged Decision of the Court of Appeals, the Applicant submitted a request for protection of legality to the State Prosecutor's Office and which was rejected.

78. Consequently, based on the abovementioned explanations, the Court finds that the Applicant has exhausted the legal remedies regarding the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals, in accordance with paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and point (b) of paragraph (1) of Rule 39 of the Rules of Procedure.

(i) Regarding Decision [I.EK. No. 330/19] of 1 August 2019 of the Basic Court

79. The Court recalls that the above-mentioned Decision of the Basic Court was rendered as a result of the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals. The Decision of the Basic Court (i) in the relevant legal remedy stated that against this Decision "*no appeal is allowed*"; and (ii) had resumed the contested proceedings between the respective parties, namely the Applicant and "Nita Commerc", reasoning that "*The Court of Appeals of Kosovo in the appeal procedure, by Decision Ae. No. 287/18 of 27.05.2019 annulled the Decision on dismissing the lawsuit, I.EK. No. 424/14, of 2.11.2018, and has remanded the case for reconsideration and retrial, arguing that the claim from the lawsuit is not an adjudicated case and at the same time it was recommended to this court to conduct the trial in the first instance, namely to conduct the review of the claim on merits.* "Nita Commerc", in its comments submitted to the Court, has specifically claimed that there was a lack of exhaustion of legal remedies regarding the Decision of the Basic Court.

80. In this context, the Court first refers to Article 206 [no title] of the LCP, which, *inter alia*, stipulates that if the same law expressly provides that a separate appeal is not allowed, the first instance decision can be challenged only by an appeal filed against the decision terminating the proceedings of the case in the court of first instance. Based on this provision, and according to the allegation of "Nita Commerc", the Decision [I.EK. No. 330/19] of 1 August 2019 of the Basic Court, could be appealed to the Court of Appeals, only after the proceedings in the Basic Court have been completed.

81. However, in such cases, which relate to allegations of breach of legal certainty, namely the reopening of court proceedings which may have reached the status of *res judicata* decisions, the Court first recalls the case law of the ECtHR, which in such cases, applies a flexible approach to assessing the exhaustion of legal remedies. For example, in case *Brumarescu v. Romania* (Judgment of 28 October 1999), the ECtHR assessed the merits of the case despite the fact that the case was pending

before the relevant domestic court, finding a violation of Article 6 of the ECHR, as a result of the reopening of the court proceedings and their remand to retrial, after the case concerned had been adjudicated once and reached *res judicata* status. (See the case of the ECtHR, *Brumarescu v. Romania*, cited above, paragraph 30 and paragraphs 51 to 55).

82. Based on this case law, the Court has also made exceptions in terms of the exhaustion of legal remedies provided for by law in cases in which preliminary court decisions may have reached *res judicata* status. More specifically, in cases (i) KI132/15, the Court found that the Applicant has exhausted all legal remedies provided by law despite the fact that by a decision of the Appellate Panel, the preliminary Judgments were annulled and which were alleged to have reached the status of *res judicata* decisions, and the case was remanded to the Basic Court in Peja (see, Case KI132/15, cited above, paragraphs 60 to 66); and (ii) KI122/17, the Court found that the respective Applicant has exhausted the legal remedies provided by law, despite the fact that the challenged Judgment of the Court of Appeals in conjunction with the relevant Judgment of the Basic Court, *inter alia*, found that the Applicant, "*has not used all administrative legal remedies*", a finding which was reached only after holding four court proceedings regarding a security measure, which according to the respective allegations, had reopened proceedings which had already reached the status of *res judicata* decisions. (See Case Court KI122/17, cited above, para 122).

83. Therefore, based on the abovementioned clarifications, the Court finds that the Applicant has also exhausted the legal remedies regarding the Decision [I.EK. No. 330/19] of 1 August 2019 of the Basic Court, in accordance with paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and point (b) of paragraph (1) of Rule 39 of the Rules of Procedure.

84. Finally, the Court finds that the Applicant's Referral meets the admissibility criteria established in paragraph 7 of Article 113 of the Constitution, Articles 47, 48 and 49 of the Law and paragraph (1) of Rule 39 of the Rules of Procedure. Furthermore, the latter cannot be declared inadmissible on the basis of the requirements set out in paragraph (3) of Rule 39 of the Rules of Procedure. Whereas, the Court considers that this Referral is not manifestly ill-founded on constitutional basis, as established in paragraph (2) of Rule 39 of the Rules of Procedure and, therefore, it must be declared admissible and must be assessed on its merits.

Relevant Constitutional and Legal Provisions

Constitution of the Republic of Kosovo

Article 31
[Right to Fair and Impartial Trial]

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.
Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.
[...]

European Convention on Human Rights

Article 6
(Right to a fair trial)

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
[…]

Law No. 03/L-006 on Contested Procedure

Article 182
[no title]

182.1 Basic violation of provisions of contested procedures exists in case when the court during the procedure didn't apply or wrong application of any of the provisions of this law, while this has or will impact a rightful legal decision.

Article 259
[no title]

If the plaintiff changes the claim by requesting something else on the same factual basis or sum of money, the charged party can reject the change if the change is a result of new created circumstances after the charges were raised.

Article 391
[no title]

After the pre examination the court can drop charges as unnecessary if it determines that:
a) it is not within court's jurisdiction;
b) parties have contractual agreement from the arbitral case settlement;
c)) for the charges raised exist court dependence (litispendence);
d) it has already been trialed (res iudicata);

Merits

85. The Court first recalls that the circumstances of the present case relate to a Loan Agreement and the subsequent Collateral Agreement of 2003, on the basis of which "Nita Commerc" received a loan of 269,800.00 euro from the Bank, with a payment period of twelve (12) months. Considering that the liabilities of "Nita Commerc" to the Bank were not performed based on the agreement between the parties, since 2006

the legal proceedings had been initiated which resulted in one criminal proceeding and three contested proceedings.

86. From the outset of the court proceedings, the Bank alleged that "Nita Commerc" failed to fulfill its obligations to the Bank, seeking to prove a debt in the amount of 150,000 euro and respective interest, whereas "Nita Commerc" challenged these allegations, noting, *inter alia*, that the Bank's employees made unauthorized interference in its bank account, resulting in double payments in the amount 74,000 euro. The first decision in the court proceedings that followed as a result of this dispute is Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court, by which, after reviewing the expertise of 30 October 2006, it had approved the statement of claim of the Bank, obliging "Nita Commerc" to pay the main debt of 150,000 euro and the relevant interest, and stating, among other things, that the allegations of "Nita Commerc" that the amount of 74,343.00 euro was paid twice due to the "*unauthorized interference in his account*" by the Bank employees, based on the evidence before the court and the financial expertise of 30 October 2006, are not grounded, and based on the same expertise, it was concluded that "*it is not a question of double payments but of a payment made continuously"*.

87. The Judgment of the District Commercial Court was confirmed twice by the Supreme Court, namely the Judgments [Ae. No. 2/2007] of 17 September 2009 and [Rev. E. No. 20/2009] of 17 March 2010. The proceedings regarding the enforcement of the Judgment of the District Commercial Court, were also approved by the regular courts, by the Decision [E. No. 406/09] of 11 November 2009 of the Municipal Court. Based on the case file, the execution of the enforcement procedure related to the mortgage that was pledged to secure the loan by "Nita Commerc", was completed on 26 July 2013.

88. However, in December 2009, "Nita Commerc" initiated new legal proceedings against the Bank. This time, "Nita Commerc" filed a lawsuit against the Bank, regarding the amount of 74,360.00 euro, which it claimed that the Bank had appropriated as a result of unauthorized interference of its employees in its bank account. The District Commercial Court by the Decision [IV. C. No. 1/2010] of 12 May 2010 rejected the lawsuit based on Article 391 of the LCP, considering the latter as *res judicata*, referring to three preliminary court decisions, namely the Judgment [C. No. 207/2006] of 23 November 2006 of the District Commercial Court and Judgments [Ae. No. 2/2007] of 17 September 2009 and [Rev. E. No. 20/2009] of 17 March 2010 of the Supreme Court.

89. Whereas, in December 2009 and May 2010, the owner of "Nita Commerc" initiated two other court proceedings. The first was initiated through a criminal report against the Bank, namely its director and employees A.Sh., M.B. and Sh.K., whom he accused of unauthorized interference in its bank account and misappropriation of the amount of 79,786.00 euro. Whereas, the second, started by a lawsuit for "*not allowing the execution*" of the Decision [E. No. 406/09] of 11 November 2009 of the Municipal Court, which allowed the enforcement of the Judgment [C. No. 207/2006] of 23 November 2006 of the District Commercial Court.

90. With regard to the criminal proceedings, based on the case file, the criminal report of 17 May 2010 of "Nita Commerc", on 4 June 2013, resulted in the Decision to initiate investigations against the defendants A.Sh., M.B. and Sh.K., by the Serious Crimes

Department of the Basic Prosecution, under suspicion of committing the criminal offense of misappropriation in office, as defined in the relevant provisions of the PCCK. Also, based on the case file it results that the Basic Prosecution in Ferizaj, filed the Indictment [PP.l. No. 111/20 J 5] only against persons A.Sh. and M.B. The Indictment was filed against both, but the latter was modified by the State Prosecutor, withdrawing the Indictment with respect to the person M.B. On 31 March 2016, the Serious Crimes Department of the Basic Court, by Judgment [PKR. No. 209/2015] acquitted the person A.Sh of charges. This Judgment was subsequently upheld by the Court of Appeals, by Judgment [PAKR. No. 392/16] of 15 March 2017.

91. While, regarding the lawsuit for "*not allowing the execution*" of 19 May 2010, the Court recalls that three years later, namely on 13 September 2013, "Nita Commerc", submitted another submission to the Municipal Court, requesting the modification of this lawsuit in a claim for compensation of damages, already in the amount of 98,019.43 euro, in contrast to the initial value of 74,000 euro. In context of this contested procedure, the Basic Court in Gjakova by the relevant Decision declared itself incompetent from a substantive point of view, while in July of 2015, the Basic Court in Prishtina terminated the contested procedure until the criminal case was completed. Considering that the criminal proceedings ended in 2016, the Basic Court continued the contested procedure, assigning two additional expertise, namely the financial expertise done by the expert F.K., and another, which would be done by three experts of the Faculty of Economics of the University of Prishtina. The former confirmed that "*there was no duplication of banking operations*", explaining the method of payment of 74,306 euros and that of 23,930.06 euro, while the second, namely, that of the Faculty of Economics, as explained in the summary of facts in this case was never submitted to the Basic Court. The Basic Court, after reviewing the relevant evidence and expertise, by the Decision [I.EK. No. 424/14] of 2 November 2018, decided that the case under review met the legal requirements to qualify as *res judicata*.

92. After five (5) decisions rendered in this contested procedure, namely (i) three decisions of the first group which decided on merits regarding the dispute between "Nita Commerc" and the Bank, such as Judgment [VIII.C. No. 207/06] of 23 November 2006 of the District Commercial Court, Judgment [Ae. No. 2/2007] of 17 September 2009 of the Supreme Court and Judgment [Rev E. No. 20/2009] of 17 March 2010 of the Supreme Court, and by which all allegations of "Nita Commerc" were rejected; and (ii) two (2) other decisions, which were rendered after "Nita Commerc" filed a new lawsuit for compensation of damage, namely Decision [IV. C. No. 1/2010] of 12 May 2010 of the District Commercial Court and Decision [I.EK. No. 424/14] of 2 November 2018 of the Basic Court, rendered after the completion of the criminal proceedings, which confirmed that the dispute between "Nita Commerc" and the Bank, is now an "*adjudicated matter*" based on point d) of article 391 of the LCP, in May 2019, acting upon the appeal of "Nita Commerc", the Court of Appeals, by the Decision [Ae. No. 287/18] of 27 May 2019, challenged in the circumstances of the present case, had ordered that the case be remanded to the Basic Court for reconsideration on merits, stating that the relevant civil dispute could not qualify as *res judicata*. The Applicant's request addressed to the State Prosecutor to initiate a request for protection of legality against this Decision was rejected.

93. Based on this Decision of the Court of Appeals, on 1 August 2019, the contested proceedings were resumed before the Basic Court, initially (i) by the Decision [I.EK.

No. 330/19], also challenged in the circumstances of the present case, which rejected the Bank's request that the disputed matter be considered as an "*adjudicated matter*"; and (ii) a financial super-expertise was assigned, which, based on the case file, turns out to have concluded, *inter alia*, that "*there was no interference of bank employees in the account of the entity "Nita Commerc" without authorization*".

94. The Court recalls that the Applicant before the Court alleges these two Decisions, namely the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals and the Decision [I.EK. No. 330/19] of 1 August 2019 of the Basic Court, have been rendered in violation of its fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, emphasizing that in the circumstances of this case the principle of legal certainty has been (i) violated; and (ii) the right to a reasoned court decision. The Court will examine these allegations of the Applicant, based on the case law of the ECtHR, in accordance with which, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

95. Therefore, the Court will first examine the Applicant's allegations of violation of legal certainty, a review in which the Court will first (i) elaborate on the general principles; and then, (ii) will apply the latter to the circumstances of the present case.

(i) General principles regarding the right to legal certainty and respect of a final court decision

96. With regard to the principle of legal certainty, which presupposes respect for the principle of *res judicata*, namely, the principle of finality of final decisions, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court first notes that it has already a consolidated case law. This case law is based on the case law of the ECtHR, including but not limited to cases*, Brumarescu v. Romania,* cited above; *Ryabykh v. Russia*, Judgment of 24 July 2003; *Pravednaya v. Russia,* Judgment of 18 November 2004; *Tregubenko v. Ukraine*, Judgment of 30 March 2005; *Kehaya and others v. Bulgaria*, Judgment of 12 January 2006; *Ponomaryov v. Ukraine*, Judgment of 3 April 2008; *Esertas v. Lithuania,* Judgment of 31 May 2012; *Trapeznikov and others v. Russia*, Judgment of 5 April 2016; and *Vardanyan and Nanushyan v. Armenia*, Judgment of 27 October 2016. Furthermore, the fundamental principles regarding the principle *res judicata* are also elaborated in the cases of this Court, including but not limited to cases KI132/15, cited above; KI150/16, Applicant *Mark Frrok Gjokaj*, Judgment of 19 December 2018 (hereinafter: the case of Court KI150/16); KI67/16, Applicant *Lumturije Voca*, Resolution on Inadmissibility, of 4 January 2017 (hereinafter: the case of Court KI67/16); KI122/17, cited above; and KI87/18, cited above.

97. Based on the ECtHR case law, the right to a fair hearing before a tribunal as guaranteed by Article 6 of the ECHR must be interpreted in the light of its Preamble, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question. (See, the ECtHR cases *Brumărescu v. Romania*, cited above, paragraph 61; and *Vardanyan and Nanushyan v. Armenia*, cited above, paragraph 66 and the references therein).

98. Furthermore, based on this case law, legal certainty presupposes respect for the principle of *res judicata*, that is the principle of the finality of court decisions. It means that no party is entitled to seek a review of a final and binding court decision merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination of a case, which has already become final. The review should not be treated as an "*appeal in disguise"*, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances "*of a substantial and compelling character*". (See, *inter alia,* case of the ECtHR *Ryabykh v. Russia*, no. 52854/99, paragraph 52).

99. Based on the ECtHR practice, in assessing whether the departures from this principle are justified through the circumstances "*of a substantial and compelling character*", the relevant considerations to be taken into account in this connection include, in particular, the effect of the reopening and any subsequent proceedings on the applicant's individual situation and whether the reopening resulted from the applicant's own request; the grounds on which the domestic authorities revoked the finality of the judgment in the applicant's case; the compliance of the procedure at issue with the requirements of domestic law; the existence and operation of procedural safeguards capable of preventing abuses of this procedure by the domestic authorities; and other pertinent circumstances of the case. In addition, the review must afford all the procedural safeguards of Article 6 of the ECHR and must ensure the overall fairness of the proceedings. (See, case of the ECtHR *Lenskaya v. Russia* paragraph 33 and references used therein).

100. The case law of the ECtHR includes cases in which it has found or not found a violation of Article 6 of the ECHR due to a violation of the principle *res judicata*. The ECtHR cases in which such a violation was found include but are not limited to cases *Brumarescu v. Romania*, *Ryabykh v. Russia, Pravednaya v. Russia, and Tregubenko v. Ukraine* (all cited above). In these cases and based on the specifics of each of them, the ECtHR, among others, noted that (i) one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires that where the courts have finally determined an issue, their ruling should not be called into question (See, the ECtHR cases *Brumărescu v. Romania*, cited above, paragraph 61); (ii) the subsequent court proceedings cannot annull an entire judicial process which had ended in a judicial decision that was "*irreversible*" and thus *res judicata* (See, the ECtHR case *Brumărescu v. Romania*, cited above, paragraph 62); and (iii the subsequent court proceedings reflected an "*appeal in disguise*" rather than a conscientious effort to correct judicial errors of a "*substantial and compelling character*" (see the case of the ECtHR, *Pravednaya v. Russia*, cited above, paragraph 25).

101. Insofar as it is relevant to the circumstances of the present case, the ECtHR case law, has also put emphasis on assessing the effects of the *res judicata* principle, namely limitations *ad personam* and those related to material scope (See, the ECtHR case *Esertas v. Lithuania,* cited above, paragraphs 22 to 31; also *Kehaya and others v. Bulgaria*, cited above, paragraph 66). For example, in case *Esertas v. Lithuania*, the ECtHR found violation of Article 6 of the ECHR, emphasizing among others, that although the two claims in the two sets of proceedings were not identical, both civil proceedings concerned exactly the same legal relations and the same circumstances,

which were crucial for deciding the dispute and therefore, there were no *ad personam* or material scope limitations to determine the issue as *res judicata*. On the other hand, in the case of the Court, KI67 16, in elaborating the general principles relating to the principle *res judicata*, the Court referring to the cases *Esertas v. Lithuania* and *Kehaya and others v. Bulgaria*, also stressed the importance of assessing the effects of the principle *res judicata*, including *ad personam* (for a certain person) and in the material scope (certain issue). (See the case of Court KI67/16, cited above, paragraphs 85 to 88). The Court, in this case, had not found a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, as it had assessed that in the circumstances of the present case, the Applicant's allegations that the challenged decision was made *res judicata*, were not grounded because the latter had *ad personam* differences and a sense of material scope. (See, the case of Court KI67/16, cited above, paragraphs 95 to 99).

102. Consequently, and based on the case law of the Court and the ECtHR, in principle, a decision becomes final and reaches the status of *res judicata* if (i) the relevant decision is irrevocable because no further remedies are available; (ii) when the term for their use has expired; and (iii) when there are no *ad personam* limitations and in material scope. As explained above, exceptions to this principle may be justifiable only as a result of the circumstances of a "*substantial and compelling character*". Therefore, in applying these principles to the circumstances of the present case, the Court will then first assess whether the circumstances of the case involve decisions in the form of *res judicata* and, if so, whether their reopening is justified on the basis of the circumstances of a "*substantial and compelling character*".

(ii) Application of these principles in the circumstances of the present case

103. In applying the general principles elaborated above, the Court reiterates that in the circumstances of the present case three contested proceedings have been conducted, (i) involving the same parties, "Nita Commerc" and the Bank; respectively; and (ii) which relate, in essence, to the same issue, namely the dispute arising out of the Loan Agreement and the Collateral Agreement signed on 2 July 2003.

104. The Court recalls that in the first contested procedure, the District Commercial Court decided in favor of the Bank, by the Judgment [VIII. C. No. 207/06] of 23 November 2006. This Judgment also addressed the allegations of "Nita Commerc" regarding the unauthorized interference of the Bank employees in its account in the amount of 74,343.00 euro, rejecting the latter as unfounded. This Judgment of the District Commercial Court was also upheld by two Judgments of the Supreme Court, the Judgment [Ae. No. 2/2007] of 17 September 2009 and the Judgment [Rev. E. No. 2/2009] of 17 March 2010. Beyond the Judgments of the Supreme Court, there were no further legal remedies available, and consequently, the relevant Judgment of the District Commercial Court, had become final and enforceable. Based on the case file, the Bank's proposal for enforcement was allowed by the Decision [E. No. 406/09] of the Municipal Court, while, on 26 July 2013, the execution of the enforcement procedure regarding the mortgage for insurance of the loan by "Nita Commerc" was completed.

105. However, and as explained above, "Nita Commerc" initiated a new court proceeding through two new statement of claims. The first was submitted to the District Commercial Court on 31 December 2009, "*due to ungrounded profit*", alleging

unauthorized interference by the Bank's employees in its bank account. While the second, was submitted to the Malisheva Branch of the Basic Court in Gjakova, on 13 September 2013, requesting the modification of the statement of claim of 19 May 2010, in the claim for compensation of damage as a result of unauthorized interference of Bank employees in its bank account. The two respective courts, namely the District Commercial Court by the Decision [IV. C. No. 1/2010] of 12 May 2010 and the Basic Court in Prishtina by the Decision [I.EK. No. 424/14] of 2 November 2018, dismissed the respective statement of claims, based on Article 391 of the LCP, considering that the cases raised before them had already been adjudicated and consequently had the status of *res judicata*. Furthermore, the Basic Court in Prishtina reached this finding only after (i) initially terminating the contested procedure until the relevant criminal case related to the allegation of unauthorized interference of the Bank's employees in the bank account of "Nita Commerc" was completed; and (ii) after ordering two expertise and establishing that the allegations of "Nita Commerc" concerning "*unauthorized interference with its account*" by the Bank staff were ungrounded, furthermore that the latter were addressed by the first Judgment of the District Commercial Court, namely Judgment [VIII. C. No. 207/06] of 23 November 2006 regarding this contested issue and, consequently, constituted an "*adjudicated matter*" or *res judicata*.

106. The Court also recalls that until the issuance of the abovementioned Decision of the Basic Court, and which qualified the statement of claim of "Nita Commerc" as *res judicata*, the criminal proceedings which were initiated through the criminal report of "Nita Commerc" were completed on 17 May 2010. The Court recalls more specifically that (i) The decision to initiate an investigation was rendered against three employees of the Bank, A.Sh., M.B. and Sh.K., respectively; (ii) The indictment was filed only against two of them, A.Sh. and M.B.; (iii) The indictment had meanwhile been withdrawn in respect of person M.B .; and (iv) by the Judgment [PKR. No. 209/2015] of 31 March 2016 of the Serious Crimes Department of the Basic Court, the last person was acquitted of charges, namely A.Sh. Furthermore, based on the case file, this Judgment of the Basic Court was also upheld by the Court of Appeals, by the Judgment [PAKR. No. 392/16] on 15 March 2017, and consequently became final.

107. However, acting upon the appeal of "Nita Commerc", on 27 May 2019, the Court of Appeals by Decision [Ae. No. 287/18], remanded the case for reconsideration regarding the merits of the case. By this Decision, the Court of Appeals reasoned, *inter alia*, as follows:

> *"The conclusion and position of the first instance court is not fair and as such cannot be accepted, as the challenged decision contains violation of the provisions of the contested procedure provided by Article 182 par 1 in conjunction with Article 391 paragraph 1 point d) of the LCP* [...] *that the appeal of the claimant is grounded, because the first instance court did not correctly assess that in this civil dispute, the position of the parties in the proceedings is different as it is the legal basis and the value of the dispute are different, namely by the judgment of the District Commercial Court in Prishtina VIIIC. No. 207/06 of 23.11.2006, the issue of debt payment has been adjudicated, while now the subject of the dispute is the compensation of the damage, which allegedly the respondent, namely its officials, caused damage to the claimant by misappropriating money from its account unlawfully, and against whom criminal investigations have been initiated, but so far no epilogue of this*

criminal procedure is known. Therefore, in the present case the legal requirements to apply the legal provisions of Article 391 point d) of the LCP have not been met because the request of the lawsuit does not relate to a case which was previously decided by a final court decision. From the reasons above, the Court of Appeals found that the first instance court has violated the above-mentioned provisions, which in the re-procedure must be eliminated in such a way as to first prove the legal basis of the statement of claim and then if the legal basis is established then the court upon the proposal of the parties may issue material evidence to prove the amount of the statement of claim [...]".

108. Based on the aforementioned reasoning of the Court of Appeals, it turns out that the latter found that the legal requirements to apply point d) of Article 391 of the LCP were not met, and consequently the case had not reached the status of *res judicata*, because in relation to the Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court (i) the position of the parties to the proceedings is different; and (ii) the legal basis and value of the dispute are different. Moreover, the Court of Appeals also stated that in the procedure conducted before the District Commercial Court "*the issue of debt payment was adjudicated*", while before it "*compensation for the damage allegedly caused by the respondent, namely it officials, by misappropriating money from its bank account in an unlawful manner"* was disputable and *"against whom criminal investigations have been initiated, but so far no epilogue of this criminal procedure is known*".

109. In the context of the reasoning of the Decision of the Court of Appeals, the Court first notes that, in the circumstances of the present case, it is not disputed that Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court, confirmed twice by the Supreme Court, namely the Judgments [Ae. No. 2/2007] of 17 September 2009 and [Rev. E. No. 20/2009] of 17 March 2010, respectively, and moreover, which was executed based on the Decision [E. No. 406/09] of 11 November 2009 of the Municipal Court in Malisheva, is *res judicata*. However, as elaborated in the general principles regarding the principle of legal certainty, in order to ascertain whether by the challenged Decision, the Court of Appeals has reopened court proceedings which have achieved the status of *res judicata*, the Court must assess whether the case under consideration before Court of Appeals, reflects (i) *ad personam* limitations; or (ii) of the material scope.

110. In this respect, the Court initially notes that (i) the parties in all contested proceedings were identical, "Nita Commerc" and the Bank; (ii) the contested issue in all proceedings arises from the Loan Agreement and Collateral Agreement signed on 2 July 2003; (iii) the first contested procedure that was concluded by Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court and was also confirmed by two Judgments of the Supreme Court, Judgment [Ae. No. 2/2007] of 17 September 2009 and the Judgment [Rev. E. No. 20/2009] of 17 March 2010, assessed the allegations of "Nita Commerc" regarding the unauthorized interference of the Bank's employees in its account, rejecting this allegation as ungrounded based on the relevant expertise; and (iv) two Decisions, namely the Decision [IV. C. No. 1/2010] of 12 May 2010 of the District Commercial Court and the Decision [I. EK. No. 424/14] of 2 November 2018 of the Basic Court, which were rendered based on the new and subsequent lawsuits of "Nita Commerc", addressed its allegations regarding the unauthorized interference of the Bank's employees in the respective account,

rejecting them as unfounded and qualifying the case as *res judicata* based on Article 391 of the LCP.

111. Therefore, based on the abovementioned explanations and specifically with regard to *ad personam* limitations, the Court notes that it is not disputed that in the circumstances of the present case, there are no such limitations, because throughout the three contested proceedings, the parties to the proceedings, the Bank and "Nita Commerc", were identical.

112. In addition, as regards the limitations in the material scope, the Court notes that it is correct that, unlike the initial lawsuit filed with the District Commercial Court on 14 July 2006, which was related to the confirmation of debt of "Nita Commerc" towards the Bank in its entirety deriving from the Loan and Collateral Agreement of 2 July 2003, the lawsuit under review before the Basic Court, which decision was challenged before the Court of Appeals, was related only to the claim for compensation of damage as a result of the claim of "Nita Commerc" that there had been unauthorized interference in its bank account by the Bank's employees. It is also true that the disputed value has changed in the courts depending on the relevant lawsuits of "Nita Commerc". More specifically (i) in the first contested procedure before the District Commercial Court decided by the Judgment [VIII. C. No. 207/06] of 23 November 2006, the amount of 74,343.00 euro was contested and reviewed; (ii) in the next lawsuit filed before the District Commercial Court decided by Decision [IV. C. No. 1/2010] of 12 May 2010, the amount of 74,360.00 euro was contested and reviewed; while (iii) in the lawsuit for compensation of damage of 13 September 2013, "Nita Commerc" requested compensation of damage in the amount of 98,019.43 euro. The latter, based on the expertise of 24 November 2016, consisted of the value of 74,089.37 euro, which was related to the claim for unauthorized interference of the Bank's employees in the account of "Nita Commerc" and the amount of 23,930.06 euro "*as funds not included in account statements*". The same expertise regarding the first amount, concluded that "*payments made on behalf of customs duties (8 transactions in the amount of 74,306 euro) did not cause any damage to the company* "Nita Commerc" *and there was no doubling of banking operations*", while in relation to the second, had found that "*the amount of 1,610 euro refers to the provisions on behalf of the allowed loans, while the amount of 1,455 was initially registered to the detriment of the client, but later the bank made the necessary settlements", while the remaining amount of 20,837.90 euro represents the loan liabilities of the client to the bank and for this the court has made a decision*".

113. However, the Court notes that despite the changes in the value contested in the court proceedings, this disputed amount is related to the same allegation of "Nita Commerc", namely the allegation of unauthorized interference in the relevant bank account by the Bank employees, a claim which was (i) reviewed since the first contested procedure and was rejected by the Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court upheld by the two Judgments of the Supreme Court, Judgment [Ae. No. 2/2007] of 17 September 2009 and the Judgment [Rev. E. No. 20/2009] of 17 March 2010 of the Supreme Court; (ii) reviewed and rejected by the Decision [IV. C. No. 1/2010] of 12 May 2010 of the District Commercial Court which addressed the case as *res judicata*; and (iii) reviewed and rejected by the Decision [I.EK. No. 424/14] of 2 November 2018 of the Basic Court, rendered after the completion of the relevant criminal proceedings and based on the relevant expertise, and which also addressed the issue as *res judicata*.

114. Furthermore, the Court also recalls that throughout the conduct of these contested proceedings for more than ten (10) years and up to the challenged Decision of the Court of Appeals, the regular courts ordered the conduct of three different expertises. The first was determined by the District Commercial Court and submitted on 30 October 2006. The second and third were assigned by the Basic Court after it had resumed the examination of the dispute between the parties. One was assigned to the expert F.K., while the other to the Faculty of Economics of the University of Prishtina. That of expert F.K. was submitted to the Basic Court on 24 November 2016, while that of the Faculty of Economics, was never submitted, resulting in a fine imposed by the Basic Court on the relevant professors appointed to complete this expertise. The relevant expertise, concluded, in principle, that the allegations of "Nita Commerc" that there has been unauthorized interference of the Bank's employees in its bank account had been reviewed since the first contested procedure, moreover that according to the latter, the allegations of such interference were ungrounded. Among other things and based on these expertise, the regular courts qualified the case as *res judicata*. Also, based on the case file, a fourth expertise was ordered by the Basic Court, as the Court of Appeals remanded the case for reconsideration on merits, rejecting to qualify this contested matter as *res judicata*. The last expertise, which was prepared by three (3) financial experts, was submitted to the Basic Court on 14 November 2019 and the findings of the latter confirm, in principle, those of the preliminary expertise.

115. Based on the above, in the circumstances of the present case, in the context of the limitations of the material scope, the Court reiterates that despite the differences in the respective contested value in the court proceedings, the latter relate to the same allegation of "Nita Commerc", namely the allegation that there was unauthorized interference of the Bank's employees in its account, and consequently, entails the same contested matter and which is essential for the settlement of the respective dispute. Therefore, the Court does not consider that the contested matter before the Court of Appeals contained limitations within its material scope.

116. Therefore, the Court notes that the case before the Court of Appeals by the challenged Decision (i) had no *ad personam* limitations; nor (ii) of the material scope. More specifically, despite the reasoning of the Court of Appeals, in the challenged Decision, namely the Decision [Ae. No. 287/18] of 27 May 2019, that (i) the position of the parties in the procedure is different; and (ii) the legal basis and value of the dispute are different, the issue before it, in fact, involved (i) the same parties; and (ii) the same matter which had already been resolved by a final decision, namely Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court, and which, as it was held also by the Basic Court by the Decision [I.EK. No. 424/14] of 2 November 2018, was *res judicata*.

117. In support of this finding, the Court refers to the case of the ECtHR, *Esertas v. Lithuania* (Judgment of 31 May 2012), which relates to a civil dispute between an Applicant and a heating services company. Two sets of proceedings took place between the same parties. Initially, the District Court of the respective city ruled in favor of the Applicant. The opposing party did not file the relevant complaint in a timely manner. However, subsequently, similar to the circumstances of the present case, the opposing party filed a new lawsuit against the respective Applicant. The District Court upheld the request, reasoning, *inter alia*, that the first decision of the court "*had no res judicata effect as the new request concerned a different period of*

time, and that this situation was not identical to that of the previously decided". The Regional Court also upheld this decision. The ECtHR, in examining the relevant case, found a violation of Article 6 of the ECHR. The ECtHR, *inter alia*, reasoned that (i) although the allegations in both sets of proceedings were identical, both civil proceedings concerned exactly the same legal relationship and the same circumstances, which were essential to the settlement of the dispute; (ii) there was no justification for requiring the Applicant to testify again, in the second proceedings, the fact that he was not in a contractual relationship with the opposing party or that the relevant services were not provided because these circumstances were established in the first set of proceedings; (iii) the departure from the principle of legal certainty would be in line with the requirements of Article 6 of the ECHR only if justified by the need to rectify a defect of an essential importance to the judicial system, whereas in the circumstances of the present case this was not the case; (iv) the second group of proceedings merely interpreted and applied the law differently, which does not constitute a defect of substantial importance within the meaning of the case law of the ECtHR and cannot justify departure/deviation from the principle of legal certainty; and (v) depriving the final decision of 7 June 2004 of *res judicata* effect, the domestic courts acted in breach of the principle of legal certainty guaranteed by Article 6 of the ECHR.

118. Similar to the circumstances of the present case, (i) although the allegations in the three sets of proceedings were not identical, they all concerned exactly the same legal relationship and the same circumstances, which were essential to the settlement of the dispute; and (ii) the procedure that resulted in the challenged Decision of the Court of Appeals, merely interpreted and applied the law differently, finding that in this case the requirements to apply point d) of Article 391 of the LCP, namely to qualift the disputed case as an "*adjudicated matter*" have not been met.

119. In this context, it is not disputed that the Court of Appeals, by the Decision [Ae. No. 287/18] of 27 May 2019, reopened the proceedings that had already reached the status of *res judicata*, but whether the reopening of these proceedings and the remand of the case before the Basic Court, entails circumstances of a "*substantial and compelling character*", which could be justified through the need to correct a flaw of substantial importance in the preliminary decision-making of the courts, which based on the case law of the Court and that of the ECtHR, as explained in the elaboration of the general principles above, could be in line with the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

120. In assessing whether the reopening of proceedings which have reached *res judicata* status by the Court of Appeals, in the circumstances of the present case, can be justified by circumstances of a "*substantial and compelling character*", the Court notes that the Court of Appeals, although not clearly, seems to justify the remand of the case to the Basic Court, based on the fact that the criminal proceedings regarding the criminal report of "Nita Commerc"that the Bank's employees had interfered in its bank account in an unauthorized manner, had not yet been completed, stating that "*so far the epilogue of this criminal procedure is not known*. However, the Court recalls that (i) the relevant criminal report against defendants A.Sh., M.B. and Sh.K., was submitted on 17 May 2010; (ii) The decision to initiate the investigation was issued on 4 June 2013; (iii) The indictment was filed on 5 December 2015 only against persons A.Sh. and M.B., while it was subsequently withdrawn with respect to the person M.B .; (iv) by the Judgment [PKR. No. 209/2015] of 31 March 2016, the

person A.Sh was acquitted of charges; and (v) The abovementioned acquittal Judgment was also upheld by the Court of Appeals, by the Judgment [PAKR. No. 392/16] of 15 March 2017. In addition, as already clarified, the Basic Court terminated the contested procedure by the relevant Decision until the acquittal Judgment was rendered in criminal proceedings, and then continued the latter, dismissing the relevant claim on the basis of *res judicata*.

121. Therefore, the Court notes that at the time when the Court of Appeals rendered the challenged Decision on 27 May 2019, the relevant criminal proceedings were completed by an acquittal Judgment of the Basic Court of 31 March 2016 and the Judgment of the Court of Appeals, confirming the latter on 15 March 2017. Therefore, on 27 May 2019, namely the date of issuance of the challenged Decision of the Court of Appeals, its reasoning that "s*o far the epilogue of this criminal procedure is not known*", is ungrounded and is contrary to all the factual circumstances of the case. On the contrary, the relevant criminal proceedings had been completed and its "epilogue" was clear before the issuance of the Decision of the Basic Court challenged before the Court of Appeals. Based on the relevant Judgments of the regular courts in criminal proceedings, it was not established that there was unauthorized interference of the Bank's employees in the bank account of "Nita Commerc".

122. The Court must also find that the reopening of decisions which had acquired the status of *res judicata*, in the circumstances of the present case, cannot be justified by the need to correct a flaw of substantial importance in the preliminary decision-making of the courts. The regular courts, in a number of pre-trial proceedings, decided on all allegations of identical parties and on the same contested issues, and also the criminal proceedings had not resulted in any suspicion which could entail the need to reopen the relevant proceedings, in order to correct any flaw of substantial importance to justice. Consequently, the reopening of the court proceedings in the present case does not involve any circumstances of a "*substantial and compelling character*", which could justify the departure from the principle of legal certainty.

123. The Court further notes that the departure from the principle of legal certainty was unjustified in the third set of proceedings and also notes that the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals annulled an entire court proceeding, which ended in court decisions which were "*irreversible*" and consequently, *res judicata* and which, moreover, were executed. Depriving the Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court of its effect *res judicata*, by the Decision [Ae. No. 287/18] of 27 May 2019, the Court of Appeals, consequently acted contrary to the principle of legal certainty guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. (See, for a similar finding, the case of the ECtHR, *Kehaya and Others v. Bulgaria*, cited above, paragraph 67).

124. The Court also recalls that after rendering the abovementioned Decision by the Court of Appeals, the Basic Court, on 1 August 2019, by the Decision [I.EK. No. 330/19] rejected the Applicant's request that the disputed case be considered as an "*adjudicated matter"* and decided that the proceedings should continue with a review of the claim on merits. The Applicant also challenges this Decision of the Basic Court before the Court. Considering that the Court has already found that (i) Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court is *res judicata*; and (ii) the challenged Decision of the Court of Appeals, namely Decision

[Ae. No. 287/18] of 27 May 2019, reopened a court proceeding that has reached a *res judicata* status without any reasoning of a "*substantial and compelling character*" to the detriment of the principle of legal certainty contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, must also find that the challenged Decision of the Basic Court, namely the Decision [I.EK. No. 330/19] of 1 August 2019, which rejected the qualification of the contested matter as *res judicata*, but had decided to proceed with the review of the merits of the case, is contrary to the principle of legal certainty and consequently, also with the abovementioned articles of the Constitution and the ECHR.

125. Finally, based on its case-law and that of the ECtHR, the Court notes that (i) although the allegations in the three sets of proceedings were not identical, all civil proceedings concerned exactly the same legal relationship; and the same circumstances, which were essential for the settlement of the dispute; (ii) there was no justification for requiring the parties to prove again, in the second and third proceedings, whether or not there has been an unauthorized interference by the Bank's employees in the bank accounts of "Nita Commerc"; (iii) moreover, the criminal proceedings initiated through the criminal report alleging that there had been unauthorized interference of the Bank employees in the bank account of "Nita Commerc" ended by the acquittal Judgment against the relevant employees of the Bank, before the challenged Decision of the Court of Appeals and the Basic Court, and which reopened the court proceedings which had become final and, moreover, had been executed; (iv) the departure from the principle of legal certainty would be in line with the requirements of Article 31 of the Constitution in conjunction with Article 6 of the ECHR only if it could be justified by the need to correct a flaw of substantial importance to the judicial system; while in the circumstances of the present case, this is not the case; (v) the third set of proceedings merely resulted in a different interpretation and application of the applicable law based on a "appeal in disguise" and does not reflect a a conscientious effort to correct judicial errors of a "*substantial and compelling character*"; namely a flaw of substantial importance within the meaning of the case law of the Court and the ECtHR and, consequently, such a procedure cannot justify the departure/deviation from the principle of legal certainty; and (vi) depriving Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court of *res judicata* effect, the Court of Appeals, by Decision [Ae. nr. 287/18] of 27 May 2019 and the Basic Court, by the Decision [I.EK. No. 330/19] of 1 August 2019, acted in violation of the principle of legal certainty, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

126. Therefore, taking into account the abovementioned remarks and the procedure as a whole, the Court finds that the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals and the Decision [I.EK. No. 330/19] of 1 August 2019 of the Basic Court, are contrary to the principle of legal certainty embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, because they have reopened final decisions of courts that had the status of *res judicata*, without any justification or circumstances of a "*substantial and compelling character*". As such, both are in contradiction with the Constitution, and, consequently, invalid.

127. Taking into account that the Court has already found that the challenged Decisions of the Court of Appeals and the Basic Court, are not in compliance with Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to a violation of principle

of legal certainty, considers that it is not necessary to examine the other allegations of the Applicant, namely those related to the lack of a reasoned court decision.

128. The Court also notes that based on the case file, after the Applicant submitted his Referral to the Court, challenging the two above-mentioned Decisions, the Basic Court in the meantime decided on the merits of the case by the Judgment [I. EK. No. 330/19] of 20 June 2020, rejecting all allegations of "Nita Commerc" as ungrounded, while based on the appeal of "Nita Commerc", the case is under consideration in the Court of Appeals. In this context, the Court notes that having regard to the declaration in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR of (i) Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals; and (ii) the Decision [I. EK. No. 330/19] of 1 August 2019 of the Basic Court, on the basis of which, it was proceeded with the review of the merits in the circumstances of the respective case, any further procedure regarding the present case, is also contrary to the abovementioned articles of the Constitution and the ECHR.

Conclusions

129. The Court, in the circumstances of this case, assessed the Applicant's allegations regarding the violation of legal certainty, a right guaranteed, according to the clarifications of this Judgment, by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

130. More specifically, in the circumstances of the present case, the Court assessed the constitutionality of two Decisions, namely the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals and the Decision [I.E. No. 330/19] of 1 August 2019 of the Basic Court, and which according to the Applicant's allegations, had reopened a court proceedings which was concluded by the Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court and subsequently upheld, by two Judgments of the Supreme Court.

131. In assessing the relevant allegations, the Court first elaborated on the general principles deriving from its case-law and that of the ECtHR, regarding the principle of legal certainty, namely, the principle of finality of final decisions, clarifying, *inter alia*, that (i) one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that once the courts have finally decided a case, their decision should not be called into question and become subject to further consideration; (ii) no party has the right to request a review of a final and binding court decision merely for the purpose of obtaining a rehearing and a fresh determination of the case, in particular through an "*appeal in disguise*"; and (iii) departures from such a principle are possible only if justified by the circumstances of a "*substantial and compelling character*".

132. In this context, the Court, applying the general principles of the case law of the Court and the ECtHR, with regard to the principle of legal certainty, initially assessed whether the two challenged Decisions reopened preliminary decisions that reached *res judicata* status, including whether the cases before them involved limitations on *ad personam* and/or material scope, and if this is the case, if their reopening was justified by circumstances of a "*substantial and compelling character*".

133. With regard to the first issue, the Court found that the challenged Decisions of the Court of Appeals and the Basic Court reopened the proceedings which had already reached the status of *res judicata*, by the Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court, as confirmed by two Judgments of the Supreme Court, Judgment [Ae. No. 2/2007] of 17 September 2009 and Judgment [Rev. E. No. 20/2009] of 17 March 2010; Decision [IV. C. No. 1/2010] of 12 May 2010 of the District Commercial Court; and Decision [I. EK. No. 424/14] of 2 November 2018 of the Basic Court. The Court emphasized that despite certain differences in the three contested proceedings, the case before the Court of Appeals had no *ad personam* or material scope limitations, namely that all civil proceedings concerned exactly the same legal relationship and the same circumstances, which were essential to the settlement of the relevant dispute. With regard to the second case, the Court also found that in the circumstances of the present case, the reopening of these proceedings was not justified by circumstances of a "*substantial and compelling character*". In this context, the Court emphasized that the reasoning of the Court of Appeals, by the challenged Decision, that the conduct of a criminal procedure in parallel with the contested procedure prevented the qualification of the respective civil case as *res judicata*, emphasizing that "*so far the epilogue of this criminal procedure is not known*", is incorrect because until the moment when the Court of Appeals rendered the challenged Decision, the entire criminal procedure ended by two Judgments in criminal proceedings which had acquitted the accused, namely the Bank employees of criminal liability, which "Nita Commerc" and the relevant Prosecution claimed to be holding.

134. Therefore and finally, the Court found that the reopening of the court proceedings which ended by final decisions and moreover were executed, in the circumstances of the present case, was not justified through the circumstances of a "*substantial and compelling character*" and consequently, in rendering the Decision [Ae. No. 287/18] of 27 May 2019 and the Decision [I.EK. No. 330/19] of 1 August 2019, the Court of Appeals and the Basic Court acted contrary to the principle of legal certainty embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, and consequently the same Decisions were declared invalid.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.7 of the Constitution, Articles 20, 21 and 47 of the Law and Rule 59 (1) (a) of the Rules of Procedure, in the session held on 5 May 2021, unanimously:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 of the Constitution of the Republic of Kosovo in conjunction with Article 6 of the European Convention on Human Rights;

III. TO HOLD that Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court, is final and binding, and as such *res judicata;*

IV. TO HOLD that Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals and Decision [I.EK. No. 330/19] of 1 August 2019 of the Basic Court in Prishtina are invalid;

V. TO ORDER regular courts to terminate all proceedings in this contested matter in accordance with this Judgment;

VI. TO ORDER the Court of Appeals to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, by 5 August 2021, about the measures taken to implement the Judgment of the Court;

VII. TO REMAIN seized of the matter pending compliance with that order;

VIII. TO NOTIFY this Decision to the Parties, and, in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;

IX. This Judgment is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Gresa Caka-Nimani

Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.