



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

Pristina, 14 October 2013
Ref.no.:RK481/13

RESOLUTION ON INADMISSIBILITY

in

Case No. KI53/13

Applicant

N.T.SH. "Alba-Oil"

**Constitutional Review of the judgment of the Supreme Court of Kosovo,
Ac. No. 160/2011 of 13 November 2012 and notification of State
Prosecutor, KMLC. No. 139/12, of 25 January 2013**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge

The Applicant

1. The Applicant is N.T.SH. "Alba-Oil", a private company from Hani i Elezit, represented by its owner Shemsedin Ramuka.

Challenged Decision

2. The Applicant challenges the judgment of the Supreme Court of Kosovo, Ac. No. 160/2011 of 13 November 2012 and notification of State Prosecutor, KMLC. No. 139/12, of 25 January 2013.

Subject Matter

3. The Applicant claims that the challenged judgment and the notification of the State Prosecutor were adopted in violation of Article 24 [Equality before Law], Article 31 [Right to Fair and Impartial Trial] and Article 32 [Right to Legal Remedies] of the Constitution in conjunction with Article 6 [Right to a Fair Trial] of the European Convention on Human Rights (“the Convention”).

Legal basis

4. The Referral is based on Art. 113.7 of the Constitution; Articles 46, 47, 48 and 49 of the Law, and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 8 April 2013, the Applicant submitted the Referral to the Court.
6. On 16 April 2013, the President appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (Presiding), Almiro Rodrigues and Enver Hasani.
7. On 13 May 2013, the Court notified the Applicant that the referral had been registered with the Court. In addition, on 17 May 2013, the Applicant was asked to provide the challenged notification of the State Prosecutor to the Court.
8. On 13 May 2013, the Court notified the Office of the State Prosecutor of the referral.
9. On 22 May 2013, the Applicant submitted to the Court the challenged notification of the State Prosecutor.
10. On 12 September 2013, after having considered the Report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

The facts of the case

11. On 4 July 2011, the company AXP submitted a petition to the District Commercial Court in Pristina requesting, *inter alia*, that the Applicant as the respondent party in the civil proceedings is obliged to pay a debt in the amount of 25,890 Euro.

12. Following that, on 24 August 2011, a preparatory hearing was scheduled before the District Commercial Court in Pristina, which the Applicant did not attend.
13. On the same date, the District Commercial Court issued the Default Judgment II.C. no. 200/2011 and approved the petition of AXP. In the reasoning of the Default Judgment was stated as follows: "*As the respondent party was duly summoned to the preparatory hearing in this legal matter, it did not respond to the summon and it not justify the absence, and even though within the meaning of Article 394 of LCP it was served with a resolution for replying to the lawsuit, it did not make use of the legal right under Article 395 of the LCP to submit a reply to the lawsuit, it did not challenge the claim by any submission...and there are no well-known circumstances that would lead to the conclusion that the respondent was prevented from attending the hearing due to good causes, the requirements from Article 151.1 of the LCP for issuing a Default Judgment have been met...*"
14. On 21 September 2011, the Applicant submitted an appeal against the Default judgment to the Supreme Court. In the appeal the Applicant stated that there are new facts in the case that would be presented at the next hearing. Also, according to the Applicant, the summon for the hearing was served to a seasonal worker who did not inform the Applicant about the receipt of the summon.
15. On 13 November 2012, the Supreme Court of Kosovo issued the judgment Ac. No. 160/2011 rejecting the Applicant's appeal as unfounded and it confirmed the judgment of the District Commercial Court. In the reasoning the Supreme Court emphasized that "*[I]n the appeal the respondent does not deny the fact that one of his seasonal workers has received the court summon, but as he states, the worker did not give it to him the summon and he did not appear to the Court because he did not know about it. With regard to such justification of the respondent, the Supreme Court of Kosovo deemed that there are no well known circumstances from which one can conclude that the respondent was prevented with good cause from attending the session.*"
16. On 28 December 2012, the Applicant submitted a request for the protection of legality to the Chief Public Prosecutor.
17. On 25 January 2013, the State Prosecutor issued the notification KMLC no. 139/12 notifying the Applicant that "*after having reviewed that challenged judgment as well as other case files submitted by the Court, confirms that there are no legal grounds for filing a request for protection of legality.*"

Applicable Law

18. Article 394 of the 2009/03-L-006 Law on Contested Procedure, provides the obligation of the Respondent party in the contested procedure to submit to the court a reply to the petition together with all relevant documents within fifteen days when from the receipt of the petition.
19. Article 151.1 of the 2009/03-L-006 Law on Contested Procedure provides when the Default Judgment may be issued. This relates in particular to the situation

when a petition was sent together with an invitation for the preparatory hearing but respondent party did not come to the hearing although it was regularly invited.

Applicant's Allegation

20. In substance the Applicant alleges that there has been a violation of the right to a fair trial. In that respect the Applicant claims that there are several procedural principles that have been violated, such as "the principle of public hearing", "the principle of material truth" and "the principle of the use of procedural rights in good faith". The Applicant considers that the Supreme Court judgment that upheld the judgment of the District Commercial Court in Pristina violated his rights guaranteed by Articles 24, 31 and Article 32 of the Constitution in conjunction with Article 6 of the Convention.

Assessment of the admissibility of the Referral

21. In order to be able to adjudicate the Applicant's Referral, the Court needs to first examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, further specified in the Law on the Constitutional Court and the Rules of Procedure.
22. In that respect, the Court refers to Article 113 (1) of the Constitution which provides that:

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

In addition, the Court takes into consideration Rule 36 (2) b) of the Rules which foresees that:

"The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:

*...
(b) ... the presented facts do not in any way justify the allegation of a violation of the constitutional rights."*

23. The Applicant complains that it has not received a fair trial complying with the guarantees of Article 6 para. 1 of the Convention, which provides, in particular:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by [a] ... tribunal ..."

24. In this regard, the Constitutional Court notes that the Applicant has used all available legal remedies prescribed by the Law on Contentious Procedure, by submitting the appeal against the Default Judgment of District Commercial Court in Pristina and that the Supreme Court in Pristina has taken into account and answered his appeals on the points of law.
25. The Court reiterates that Article 6 para 1 of the Convention enshrines the "right to a court", of which the right of access, that is the right to institute proceedings

before courts in civil matters, constitutes one aspect. However, this right is not an absolute one: it may be subject to limitations, but these must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired (see *De Geouffre de la Pradelle v. France*, the ECHR judgment of 16 December 1992, Series A no. 253-B, p. 41, para 28).

26. One of the elements of a fair hearing within the meaning of Article 6 para 1 is the right to adversarial proceedings; each party must in principle have the opportunity not only to make known any evidence needed for his claims to succeed, but also to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision (see, *inter alia*, the case *Mantovanelli v. France*, the ECHR judgment of 18 March 1997, Reports of Judgments and Decisions 1997-II, p. 436, para. 33).
27. The Court notes that the Applicant had an opportunity to submit the evidences both in its favor and against the Default Judgment of District Commercial Court in Pristina, but it did not use that opportunity.
28. In the present case, the Court observes that, after detailed consideration of the facts of the case, the Supreme Court found in a reasoned decision that the Applicant had received the summon of the relevant proceedings, so that the Applicant's failure to appear before the District Commercial Court in Pristina was attributable to the Applicant's lack of diligence. In other words, if the Applicant acted diligently, it would have been able to take part in the public hearing (see, *mutatis mutandis*, the case of *Cañete de Goñi v. Spain*, Application no. 55782/00, the ECHR judgment of 15 January 2003).
29. In conclusion, the Applicant has neither built a case on a violation of any of his rights guaranteed by the Constitution nor has submitted any *prima facie* evidence of such a violation (see *Vanek v. Slovak Republic*, the ECHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005).
30. Accordingly, the Court finds that the Referral was not referred to the court in a legal manner, pursuant to Article 113 (1) of the Constitution, and Rule 36 (2) b) of the Rules, and as such is inadmissible as *manifestly ill-founded*.

FOR THESE REASONS

The Constitutional Court pursuant to Article 113 (1) of the Constitution, Article 48 of the Law and Rule 36 (2) (d) of the Rules of the Procedure, unanimously:

DECIDES

- I. TO REJECT the Referral as Inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this decision in the Official Gazette, in accordance with Article 20 (4) of the Law; and
- IV. TO DECLARE this Decision immediately effective.

Judge Rapporteur

Snezhana Botusharova

President of the Constitutional Court

Prof. Dr. Enver Hasani

