



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

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Pristine, 24 April 2012  
Ref. No.: RK223/12

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI o8-11**

Applicant

**Malush Sopa, Sedat Kuqi, Fazli Morina, Rrahman Kabashi and Liman Gashi**

V/

**Unknown Public Authority**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President

Kadri Kryeziu, Deputy-President

Robert Carolan, Judge

Altay Suroy, Judge

Almiro Rodrigues, Judge

Snezhana Botusharova, Judge

Ivan Čukalović, Judge

Gjyljeta Mushkolaj, Judge and

Iliriana Islami, Judge

## **Applicants**

1. The Applicants are: Malush Sopa, in the capacity of President of the Independent Union of NBI “Suhareka” in Suhareke; Sedat Kuqi, former Director of NBI “Suhareka” in Suhareke; Fazli Morina, director of Viniculture; Rrahman Kabashi, director of winery from village of Mohlan and Liman Gashi, commercial director from Suhareka.
2. The Applicants filed with the Constitutional Court a set of documents which they called a “Notice before action”. They submitted the authorization to represent eighty (80) former workers of “Suhareka”.
3. The “Constitutional Court of Kosovo – President” is among the 12 (twelve) addresses of public authorities to which they sent such a “Notice before action”.

## **Challenged decisions**

4. The subject of that Memo is: “Notice before Action for Procrastination of the case SCC-09-0213 dated 31/01/2011 in accordance with the lawsuit of the 16<sup>th</sup> of November 2009 and the appeal No. 474 dated 15/02/2011” and is related with purchasing NBI “Suhareka” LLC, in Suhareka.
5. The Applicants claim that *“On 19 November 2009, the Independent Trade Union of AIE “Suhareka” in Suhareka through the representatives authorized by the Authorization dated 23 October 2009 has sued: 1) Kosovo privatization Agency in Prishtina; 2) QMI- Italian Center for Furniture l.l.c with its residence in Suhodoll of Lipjan municipality;3) Gruppo Vinicolo Fantinel Spa from Italy, which Lawsuit can be found on the case SCC-09-0213”*.
6. The Applicants further point out that *“On 31 January 2011, the Special Chamber of the Supreme Court of Kosovo (...) issued (...) Decision by ruling down our Lawsuit as unacceptable and without any legal basis, although in the legal case SCC-09-0213 all the facts and evidences were attached along with secret documents which have been signed on 28 November 2006 in Treviso of Italy for fraud and conspiracy against our collective”*.

7. Finally, the Applicants state that “*The Independent Trade Union of AIE “Suhareka” in Suhareka on 15 February 2011 within the legal deadline has presented the Complaint No.474 in the Board of Complaints and Appeals of the Special Chamber of the Supreme Court of Kosovo in Prishtina and has informed all local and International missions in Kosovo for the (...) Decision SCC-019-0213 dated on 31 January 2011 against our collective in contrary to the article 346 of KCC and the article 102, paragraph 2, 3 and 4 of the Constitution of the republic of Kosovo (...)*”.

### **Subject matter**

8. The Applicants filed that “Notice before action” with the Constitutional Court, among other numerous legal provisions, “pursuant to Articles 23[Human Dignity]; 24[Equality Before the Law]; 31[Right to Fair and Impartial Trial]; 32[Right to Legal Remedies]; 44[Freedom of Association]; 53[Interpretation of Human Rights Provisions]; 54[Judicial Protection of Rights]; 84.6[Competencies of the President]; 102[General Principles of the Judicial System]; 103[Organization and Jurisdiction of Courts]; 104[Appointment and Removal of Judges]; 119[General Principles] of the Constitution of the Republic of Kosovo”.

### **Legal basis**

9. Articles 113. (7) and 21. (4) of the Constitution of the Republic of Kosovo (hereinafter, the “Constitution”), Articles 20, 22(7) and 22(8) of Law No.03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter, the “Law”) and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the “Rules of Procedure”).

### **Proceedings before the Court**

10. On 26 January 2011, the Applicants submitted the abovementioned “Notice before action”.
11. On 14 February 2011, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and a Review Panel composed of Judges Altay Suroy (Presiding), Kadri Kryeziu and Enver Hasani.

12. On 16 February 2011, the Applicants filed additional documents with the Court and also addressed the said additional documents to 12 different authorities in the Republic of Kosovo.
13. On 1 June 2011, the Applicants filed additional documents with the Court and again addressed the said documents to 12 different authorities in the Republic of Kosovo.
14. On 26 July 2011, the Servicing Enterprise “Ekspertimi” filed with the Court a document called “Financial Opinion” in relation to the Applicant’s Referral. On the same date, the said enterprise addressed the said document to 11 different authorities in the Republic of Kosovo.
15. On 28 July 2011, the Servicing Enterprise “Ekspertimi” filed with the Court a letter explaining few technical errors in the document called “Financial Opinion” which they filed with the Court on 26 July 2011.
16. On 2 August 2011, the Applicants filed additional documents with the Court, addressed the said documents to 14 different authorities in the Republic of Kosovo.
17. On 2 August 2011, Servicing Enterprise “Ekspertimi” replied to questions of the Court dated 26 July 2011, regarding its capacity to file before the Court the “Financial Opinion” pertinent to the Applicant’s Referral.
18. On 12 August 2011, the Applicants were notified about the registration of the “Notice before action” (Referral). On the same date, the Referral was communicated to the Kosovo Privatization Agency, the Special Chamber of the Supreme Court of Kosovo, QMI- Italian Center for Furniture and Gruppo Vinicolo Fantinel Spa, who have not replied to date.
19. On 17 August 2011, the Applicants filed additional documents with the Court. The said documents were addressed to 16 different authorities in the Republic of Kosovo.
20. On 5 September 2011, the Applicants filed additional documents with the Court and, again, the same documents were addressed to 18 different authorities in the Republic of Kosovo.

21. On 14 September 2011, the Applicants were requested to clarify and complete some aspects of the Referral, namely in relation to: the personal representative's data; the factual details on the act(s) of public authorities they are complaining about; the exact court or public authority the Applicants claim that with their actions or omissions have violated their rights and freedoms guaranteed by the Constitution; rights and freedoms guaranteed by the constitution they claim to have been violated; the complaint under the Constitution, indicating which Article(s) of the Constitution have been allegedly violated by public and explaining why the act(s) of this/these authority(ies) amount to a violation under the Constitution; the court or the authority final decision, if any; and what they want to achieve through the referral to the Court.
22. On 20 September 2011, the Applicants filed more or less the same documents, which were sent to 19 different authorities in the Republic of Kosovo.
23. On 4 October 2011, the Applicants replied to the Court questions filing the same set of documents, but now including an agreement of 27 August 2007 struck between, on one side, Kosovo Trust Agency (KTA), and, on the other side, QMI- Italian Center for Furniture and Gruppo Vinicolo Fantinel Spa.
24. On 23 November 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

### **Summary of facts**

25. On 19 June 2006, the Municipal Court in Suhareka issued an *assertion-verdict* C.nr.217/05 based on the lawsuit of the Applicant against the respondent AIE – SOE "Suhareka" in Suhareka duly represented with the power of attorney by Nazim Elshani, a lawyer, regarding the compensation of personal income of the workers for the period 1991-1998, which held the following:

*"Is APPROVED the lawsuit and request-claim of the workers of the Al E "SUHAREKA" in Suhareke, according to the register 11.11.2003, which can be found in the documents of the proceedings starting from 1, worker Sadik Ahmeti until 186 the worker Muhamed Elshani against the respondents AIE "Suhareka" in Suhareke.*

*Respondent AIE "Suhareka" in Suhareka is OBLIGED that to all workers according to the register dated on 11.11.2003, which can be found at the documents of this case starting from 1, worker Sadik Ahmeti until the ordinal number 186, worker Muhamet Elshani, to pay the incomes according to the record of the workers and special Decisions of the Workers Council, to each one of the workers individually, as foreseen in the record, and the total amount of all workers according to the register of 11.11.2003, signed by the commission is 750.087,00 Euros, in general amount without interest."*

*This Verdict can be executed in the moment of privatization of AIE "Suhareka" in Suhareke., to realize this legal right".*

26. In the rationale of the same *assertion-verdict*, the Municipal Court in Suhareka stated the following:

*"The court based on assertions of the representatives of the workers and representatives of AIE "Suhareka" in Suhareke, and that for this case been informed also the Kosovo Trust Agency decided to approve the Lawsuit completely and to issue a Verdict based on assertion 331 of LPC".*

27. The Kosovo Trust Agency (hereinafter, "KTA") in the year 2006-2007 during the 19-th wave of privatization by special spin-off declared the QMI-Italian Center for Furniture with residence in Lipjan and Gruppo Vinicolo Fantinel Spa with residence in Spilimbergo (Pordenone), in Italy, as provisional winners of the privatization tender.

28. On 16 November 2009, the Applicant filed a claim with the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (hereinafter, "SCSC") against respondents Privatization Agency Kosovo, QMI-Italian Center for Furniture with residence in Lipjan and Gruppo Vinicolo Fantinel Spa with residence in Spilimbergo (Pordenone) Italy, thereby seeking the annulment of the privatization of SOE "Suhareka" alleging that the provisional winner conspired with Kosovo Privatization Agency (hereinafter, "PAK") as the seller.

29. On 21 January 2010 and 23 February 2010, the SCSC issued order instructing the Applicant about the necessity of translations and also that the Trade Union has to be represented by a lawyer in front of the SCSC.

30. On 19 March 2010, the Applicant submitted the translation of the claim to the SCSC. The Applicant sought annulment of the privatization of SOE "Suhareka", alleging that the provisional winner of the privatization tender conspired with Kosovo Privatization Agency as the seller. On 30 July 2010, the Applicant submitted further documents to the SCSC emphasizing the possible criminal relevance of the case.
31. On 4 August 2010, the SCSC once again issued an order instructing the Applicant to submit a power of attorney and an instrument or instruments constituting the legal person (trade union) pursuant to Sections 24.1 and 25.4 of UNMIK AD 2008/6. On the same day, the SCSC addressed the Special Prosecution Office of the Republic of Kosovo, inquiring whether there was a criminal investigation linked to the allegations of the Applicant. The SCSC also addressed the Municipal Court of Suhareke /Suva Reka in order to obtain a copy of the case file C.nr 233/2009 mentioned in the claim.
32. On 12 August 2010, the Municipal Court of Suhareke /Suva Reka submitted the required file, wherein the said Municipal Court declared itself as incompetent and instructed the Applicant that the SCSC has jurisdiction over the case.
33. On 25 August 2010, the Applicant submitted further documents to the SCSC supplementing his claim. On 23 September 2010, the Applicant submitted additional documents to the SCSC. In none of those submissions, the Applicant attached the documents required by the SCSC.
34. Also on 25 August 2010, the Special Prosecution Office of the Republic of Kosovo confirmed to the SCSC that they are interviewing the Applicant but could not confirm the existence of an ongoing investigation.
35. On 24 September 2010, the SCSC once again ordered the Applicant to submit a power of attorney and an instrument or instruments constituting the legal person (trade union) as required by Section 25.4 of UNMIK AD 2008/6. The SCSC gave a detailed explanation in the order also warning the Applicant that failure to comply with the order will result in the rejection of the claim on the grounds of inadmissibility.
36. Within its appeal of 11 October 2010 against the said order, supplemented on 23 November 2010, the Applicant requested to "*exclude from the ruling of this case the*

*EULEX Judge Esma Erterzi because of her unilateral behaviour when she gave the illegal, anti-constitutional and discriminating decision and tricking our collective of 237 workers according to the legal dispositions*", thereby referring to its arguments in the appeal that it should be allowed to represent itself, and that it is not going to "accept any lawyer from anyone".

37. On 23 November 2010, "the recusal request" of the Applicant was rejected as ungrounded with the decision of the President of the SCSC, numbered AGJ-2010-132. However, the appeal proceedings against the order of the SCSC Judge Rapporteur, dated 24 September 2010, are still pending. Nonetheless, the Trial Panel considers that the appeal against the order of the judge in charge does not hinder the Trial Panel to render a decision on the admissibility of the claim.
38. On 31 January 2011, the SCSC (decision SCC-09-0213) dismissed the Applicant's claim on annulling the privatization of SOE "Suhareka" as inadmissible. The SCSC in the said decision provided the following legal advice for the Applicant:

*"Since the Special Chamber did not render a Decision on the merits of the claim the Claimant may file a completed or corrected claim pursuant to the UNMIK Regulations and UNMIK Administrative Direction of 2008/6".*

*"Pursuant to Section 9.5 of UNMIK Regulation 2008/4 an appeal against this decision can be submitted in writing to the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters within 30 (thirty) days from the receipt of this decision".*

### **Assessment of the admissibility**

39. That so called "Notice before action" which includes, more or less, the same documents filed in different dates and sent to different authorities does not appear as a Referral legal format as designed for complaining against violation of protected constitutional rights by the public authorities, which is the main working subject of the Constitutional Court.
40. On the contrary, the Applicants simultaneously and parallelly gave "notice before action", sending the same information to twelve/nineteen different institutions and authorities.

41. Thus, having in mind the legal nature and scope of the Constitutional Court, the “Notice before action” would not fall under the preliminary consideration of the Court and shouldn’t have been registered at all; nevertheless, the Court will take it for the sake of pedagogical purposes.
42. Article 113. (1 and 7) of the Constitution establishes the general frame of legal requirements for admissibility. It provides:
- “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.”*
43. Those admissibility requirements are further developed in the Law and the Rules of Procedure, which in addition specify, among others: complying with a prescribed deadline; including a procedural and substantive justification of the referral, with a succinct statement of facts and accurate clarification of the rights that have been violated; indicating the concrete act of public authority that is subject to challenge and the relief sought; and attaching the necessary supporting information and documents.
44. The Applicants are acting not as individuals but as representatives of legal persons. Article 21 (4) of the Constitution provides that *“fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable”*. Thus, the Applicants are entitled to submit a constitutional complaint. (*See Resolution in Case No. KI. 41/09, AAB-RIINVEST University L.L.C., Pristina, versus Government of the Republic of Kosovo, paragraph 14*).
45. However, this means that the Applicants are equally under the obligation to exhaust all legal remedies provided by law, as stipulated by Article 113.(7) for individuals.
46. The purpose of the exhaustion rule is allowing the opportunity to the public authorities, including the regular courts, of preventing or settling alleged violations of

the Constitution. The exhaustion rule is operatively intertwined with the subsidiary character of the constitutional justice procedural frame work. (*See Selmouni v. France [GC], § 74; Kudla v. Poland [GC], § 152; Andrášik and Others v. Slovakia (dec.).*

47. The principle of subsidiarity requires that the Applicants exhaust all procedural possibilities in the regular proceedings, either administrative or judicial, in order to prevent the violation of the constitution or, if any, to remedy such violation of a fundamental right. Thus, Applicants are liable to have their case declared inadmissible by the Constitutional Court, when failing to avail themselves of the regular proceedings or failing to report a violation of the Constitution in the regular proceedings. That failure shall be understood as a waiver of the right to object the violation and complain. ( *See Resolution, in Case No. KI. 07/09, Demé KURBOGAJ and Besnik KURBOGAJ, Review of Supreme Court Judgment Pkl.nr. 61/07 of 24 November 2008, paragraph 18*).
48. The Applicants, in the instant case, acted simultaneously and parallelly, which is completely against the successive and step by step nature of the exhaustion rule. Thus, they showed not having exhausted all the remedies provided by the regular legal system.
49. Therefore, the Court, taking into account all the above, should conclude that the so called referral is manifestly to be rejected as inadmissible.
50. On the other side, Article 48 of the Law on Constitutional Court establishes:  
*"The applicant of the request is obliged to mention and clearly define which rights and freedoms have been violated and which relevant Act of the public authority is also contested".*
51. The Applicants also failed to specify which rights and freedoms have been violated and which public authority act they are contesting. They do not disclose any appearance of a violation of the rights guaranteed by the Constitution.
52. Moreover, the Applicants neither have substantiate a case, where they consider themselves as victims of a violation of the Constitution (See *Scordino v. Italy (no. 1) [GC], § 179.*), nor they have attached the necessary supporting information and documents, nor they have indicated the relief sought.

53. In fact, the proceedings before the Constitutional Court are adversarial in nature. It is therefore for the parties to substantiate their factual arguments (by providing the Court with the necessary factual evidence) and also their legal arguments (explaining why and how, in their view, the Constitution provisions relied on have or have not been breached). The Court is responsible for establishing the facts; it is up to the parties to provide active assistance by supplying it with necessary supporting information and relevant documents.
54. Bearing all the foregoing in mind, it is not up to the Court to guess what the intention of the Applicants is or to build the case on behalf of the Applicants. On the contrary, under Article 113. (1) of the Constitution, it is up to the Applicants to refer the matter to the Court “in a legal manner” and comply with all requirements on admissibility of a referral.
55. In sum, the Court considers that the abovementioned “Notice before action” does not reach the minimum threshold to be considered a “legal manner” of referring the matter to the Court.
56. The way the “Notice before action” has been filed could be seen, in a strict approach, as an abuse of the right to complain. The European Court of Human Rights established that *“any conduct of an applicant that is manifestly contrary to the purpose of the right of individual application as provided for in the Convention and impedes the proper functioning of the Court or the proper conduct of the proceedings before it constitutes an abuse of the right of application”*. (See *Mirolubovs and Others v. Latvia\**, §§ 62 and 65).
57. The Constitutional Court is bound by Article 53 [Interpretation of Human Rights Provisions] of the Constitution which establishes that “Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights”.
58. However, the Court considers that, at this stage of development of the constitutional case law in Kosovo, it is not advisable to adopt such a strict approach; however, it is important for the Applicants to be aware of, as it looks like the Applicants misapprehended the role of the Constitutional Court and the nature of the

constitutional justice legal working frame as established by the Constitution, the Law and the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court pursuant to Article 113.(7) of the Constitution and Rule 36 of the Rules, on 23 November 2011, by MAJORITY,

DECIDES

- I. TO REJECT the Referral as inadmissible;
- II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law; and
- III. This Decision is effective immediately.

**Judge Rapporteur**

Almíro Rodrigues

**President of the Constitutional Court**

Prof. Dr. Enver Hasani