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

Prishtina, 01.08. 2016
Ref. no.: RK 970/16

RESOLUTION ON INADMISSIBILITY

in

Case No. KI122/15

Applicant

Tarkett LLC

Constitutional review of Judgment No. AC-I.-14-0169-A0001 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, of 2 April 2015

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge, and
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by Tarkett LLC, from Bačka Palanka, Republic of Serbija (hereinafter: the Applicant) which is represented by lawyer Mr. Milan Lazić.

Challenged decision

2. The Applicant challenges Judgment no. AC-I.-14-0169-A0001 of 2 April 2015 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel) which was served on the Applicant on 8 June 2015.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which, according to Applicant's allegations, violated Articles 31 [Right to Fair and Impartial Trial] 32 [Right to Legal Remedies] and 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on Articles 21.4 and 113.7 of the Constitution, Article 47 of the Law No. 03/L-121, on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: Rules of Procedure).

Proceedings before the Constitutional Court

5. On 8 October 2015, the Applicant submitted by DHL mail the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 6 November 2015, the President of the Court appointed Judge Robert Carolan as Judge Rapporteur, and the Review Panel, composed of Judges Altay Suroy (Presiding), Snezhana Botusharova and Bekim Sejdiu.

7. On 14 December 2015, the Court informed the Applicant and the Supreme Court of Kosovo about the registration of the Referral.

8. On 26 April 2016, the Court requested the Appellate Panel to submit the evidence on the date the challenged judgment was served on the Applicant.

9. On 29 April 2016, the Appellate Panel notified the court that the challenged decision was served to the Applicant on 8 June 2015.

10. On 13 June 2016, after having considered the report of the Judge Rapporteur, the Review Panel unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

11. On 28 October 1992, an interim administrative authority of the Socially Owned Enterprise "Fazita" - Wallpaper Factory (hereinafter: the SOE Fazita) decided

to integrate (merge) the Joint Stock Company "Sintelon" (hereinafter: JSC Sintelon), which mainly had a private capital.

12. On 4 November 1992, the Commercial Court in Novi Sad registered all the assets and liabilities of the SOE Fazita as having been transferred into a joined company, JSC Sintelon.

13. Following this, the steering board of JSC Sintelon decided to form a new company in Kosovo named Limited Liability Company Fazita-Sintelon (hereinafter: LLC Fazita-Sintelon).

14. On 2 December 1992, the new enterprise LLC Fazita-Sintelon was registered in the Commercial Court in Prishtina, with JSC Sintelon registered as one the founders of this new company.

15. This legal situation continued to exist until the formation of the Kosovo Trust Agency (hereinafter: KTA). KTA decided not to allow the merger of JSC Sintelon and LLC Fazita-Sintelon.

16. The KTA decided that the legal entity, LLC Fazita-Sintelon, should be treated as a socially owned enterprise. It then initiated the privatization process of the legal entity LLC Fazita-Sintelon.

17. On 25 August 2004, the Applicant notified the KTA of its intent to file a claim regarding this legal matter.

18. On 16 September 2004, the KTA privatized LLC Fazita-Sintelon as a socially enterprise.

19. On 11 April 2005, the Applicant filed a complaint with the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matter (hereinafter: Specialized Panel).

20. The Applicant, in the statement of claim, alleged that the JSC Sintelon is a sole owner of LLC Fazita Sintelon, that the KTA sold this company as a social property. For this reason the Applicant requested the KTA to pay it in the name of the loss of property with an interest rate (the amount of price, by which the legal entity is sold in privatization), as well as to compensate it for the loss of profit , as a result of its alleged unlawful treatment by the KTA.

21. The Applicant alleges in the claim that Privatization Agency of Kosovo (as a legal successor of the KTA) had the right to consider invalid the merger of JSC Sintelon and SOE Fazita, as invalid only if it was carried out in an unlawful and discriminatory manner under Article 5.3 of UNMIK Regulation 2002/12. However, the Applicant alleged that the transformation through the merger was based on the Law on Enterprises of 1988, which was the applicable law in Kosovo at the time pursuant to UNMIK Regulation 1999/24.

22. As evidence that there was no discrimination after the merger, the Applicant claimed that on 30 September 1998, JSC Sintelon allowed the employees of LLC Fazita Sintelon to receive shares of the company for free. The shares were

received 134 workers, of whom 98 of them were Albanians, which it allegedly was a proof that there was no discrimination after the merger company.

23. On 20 June 2013, a hearing was held at which it was established that the respondent will be represented by the Privatization Agency of Kosovo (hereinafter: the PAK) as a legal successor of the KTA. In the same hearing, the Applicant explained that JSC Sintelon had now merged with the Tarkett LLC from Backa Palanka. It argued that Tarkett LLC from Backa Palanka should now be considered as a legal successor of the SOE Sintelon.

24. On 15 April 2014, the Specialized Panel (Judgment SCC-05-0113) rejected as ungrounded the Applicant's claim for compensation for the loss of property and for the loss of profit .

25. The Specialized Panel pursuant to Section 5.4 of UNMIK Regulation 2002/12 considered whether the merger, which took place after 22 March 1989, a) was based on the applicable laws, and whether the merger b) was carried out in a non-discriminatory manner.

26. The Specialized Panel held that *„the merger was of a type of 'takeover' the SOE Fazita, which has been fully integrated into Sintelon LLC and thus lost its legal entity [...] Therefore, the 1992 merger of was a classic example of privatization since social capital was transferred to become part of predominantly private company."*

27. The Specialized Panel concluded that under the applicable law, Article 2 (1) of the Law on Trade and Disposal of Social Capital *"Contract on sale/privatization of social property and the capital should be concluded by the Development Fund under Article 2 of the Law."*

28. The Specialized Panel reasoned that the contract was not concluded by the Development Fund and the *„collected funds did not belong to the Development Fund" the* court concluded that the merger is made in an unlawful manner.

29. Furthermore, the Specialized Panel found that the distribution of free shares to employees of SOE Fazita *„is irrelevant - the workers were not the owners of the social capital."*

30. The Specialized Panel did not consider the issue of discrimination during the merger, because it considered that it was *irrelevant. "By deciding on merger without following proper privatization procedure, Interim Body, imposed on SOE Fazita, rendered an illegal decision and it does not matter if this decision was executed in non-discriminatory manner."*

31. On 19 May 2014, the Applicant filed an appeal with the Appellate Panel against the Judgment of the Specialized Panel because of *„violations of procedure, erroneous determination of factual situation and erroneous interpretation of the law."*

32. The Applicant stated in the appeal that the court applied the erroneous law and that instead of the Law on Trade and Disposal of Social Capital, the Law on

Enterprises (Official Gazette no. 77, 31 December 1989) should have been applied.

33. On 2 April 2015, the Appellate Panel (Judgment AC-1-14-0169- A0001) rejected as ungrounded the appeal of the applicant and upheld the Judgment of the Specialized Panel.

34. The Appellate Panel found that the merger was unlawful even in the case of implementation of the Law on Enterprises, which in Article 14 provides that *„for the organization of the basic organization of associated labor, the workers decide in accordance with the Statute."*

35. The Appellate Panel further examined Article 13 of the Statute of SOE Fazita *„which states that workers can make changes in the organization of the company so that it can join to another company or to be divided into two or more companies in connection with the changes and the organization of enterprise, the workers decide by a majority vote of the overall number of workers through a referendum."*

36. From the above, the Appellate Panel found that *„in the present case, the changes in the company are carried out in complete contradiction with Article 13 of the Statute of the company."*

37. The Appellate Panel in the end concluded that in the *„present case, it is about a gift or the merger of the social capital SOE 'Fazita' of a joint-stock company in Serbia, which is a typical example of arbitrary and unlawful decisions."*

Applicant's allegations

38. The Applicant alleges that challenged Judgment of the Appellate Panel, according to the Applicant's allegations violated Article 31 [Right to Fair and Impartial Trial] 32 [Right to Legal Remedies] and 46 [Protection of Property] of the Constitution.

39. The Applicant further reasons that the Appellate Panel was not constituted in accordance with Law No. 04/L-033 of Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, which regulates the composition and organization of the Special Chamber, which in Article 3.12 provides:

> *„The appellate panel shall be composed of five (5) judges, three (3) of whom must be international judges and two shall be citizens of Kosovo."*

40. In the present case, the Applicant alleges that the Appellate Panel was composed of *„three (3) judges who are citizens of Kosovo and (2) two international judges."*

41. The Applicant further states the names of local judges who are citizens of Kosovo and claims that they are represented as local judges on the official website of the Special Chamber of the Supreme Court of Kosovo.

42. Due to the alleged improper composition of the Appellate Panel, the Applicant considers that Article 31 of the Constitution was violated, which provides: *„Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations [...] within a reasonable time by an independent and impartial tribunal established by law."*

43. The Applicant further argues that: *"because Judgment no. AC-I-14-0169-A000 of 2 April 2015, was rendered by improper composition of the Appellate Panel with a majority of local judges, instead of international judges, the Applicant considers that the Appellate Panel of the Supreme Court of Kosovo cannot be considered impartial and established by law"*, and in this way Articles 31 and 32 of the Constitution were violated .

44. The Applicant also argues that *„none of the* (Specialized and Appellate) *panel took into consideration the fulfillment of both requirements under Article 5.4 of UNMIK Regulation 2002/12. In fact, both panels exceeded its powers because they analyzed whether the merger procedure was carried out in accordance with the laws on privatization, rather than to act in accordance with its powers that are envisaged by UNMIK."*

45. The Applicant concludes that *„the first and second instance panel committed discrimination without adequate assessment of facts and evidence and without taking into account UNMIK Regulations."* Therefore, in this way, according to the Applicant, Article 46 of the Constitution was violated.

46. Finally, the Applicant requests the Court*: „to annul entirely the Judgment No. AC-I-14-0169-A000 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (SCSC), of 15 April 2015. Furthermore, the Constitutional Court ordered the Appellate Panel to render a new decision in a properly formed panel, which will consist of three international and two local judges, and to take into consideration and assess all the facts and evidence presented by the Applicant during the entire proceedings, while duly protecting the constitutional rights of the applicant. Finally, the Applicant proposes that its request presented in the claim dated 11 April 2005, to be accepted in its entirety."*

Assessment of the admissibility of the Referral

47. The Court examines whether the Applicant meets the admissibility requirements established by the Constitution and as further provided the Law and foreseen by Rules of Procedure.

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

> *„(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".*

49. The Court also refers to Article 48 [Accuracy of the Referral] of the Law, which provides:

> *"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 a public authority is subject to challenge".*

50. The Court also refers to Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, which foresees:

> *"(1) The Court may consider a referral if:*
> *[...]*
> *(d) the referral is prima facie justified or not manifestly ill-founded.*
>
> *(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*
> *[...]*
> *d) the Applicant does not sufficiently substantiate his claim."*

51. The Court reiterates that the Applicant alleges that the challenged judgment of the Appellate Panel violated Articles 31, 32 and 46 of the Constitution.

(i) Alleged violation of Article 31 and Article 32 of the Constitution

52. The Court notes that the Applicant essentially based its Referral on the claim that the Appellate Panel was not composed in accordance with Article 3, paragraph 12 of Law No. 04/L-033 on Special Chamber of the Supreme Court of Kosovo Privatization Agency of Kosovo Related Matters.

53. The Applicant alleges that this Article governs the composition and the organization of the Appellate Panel and that in the present case, the Appellate Panel was composed of *„three (3) judges who are citizens of Kosovo and (2) two international judges"* and this composed Appellate Panel *„cannot be considered impartial and established by law"*, as provided by Article 31 of the Constitution.

54. The Applicant further reasons that *„such unlawfully composed panel decided on the appeal of the applicant"* and prevented the Applicant *„to use legal remedies"*, and as a result of such a composition of the Appellate Panel Articles 31 and 32 of the Constitution were violated.

55. Regarding these Applicant's allegations, the Court notes that by Article 6 of Law No. 04/L-273 on Amending and Supplementing the Law Related to the Mandate of the European Union Rule of Law in the Republic of Kosovo, were made amendments to the Law No. 04/L-033 on Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters.

56. Law No. 04/L-273 on Amending and Supplementing the Law Related to the Mandate of the European Union Rule of Law in the Republic of Kosovo, in Article 6 paragraph 5 provides the following:

Article 6

Amending and Supplementing the Law No. 04/L-033 on Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters (Law)

5. In article 3 of the basic Law, paragraph 12 is reworded as following:

„12. The appellate panel shall be composed of five (5) judges, two (2) of whom shall be EULEX/international judges. Upon the reasoned request of the EULEX competent authority Kosovo Judicial Council will decide that the panel be composed of majority of EULEX/international judges. The President of the Special Chamber shall serve as the presiding judge of the appellate panel. The four (4) other members of the appellate panel shall be assigned by the President of the Special Chamber after consultation with the President of Kosovo Judicial Council."

57. Law No. 04/L-273 on Amending and Supplementing the Law Related to the Mandate of the European Union Rule of Law in the Republic of Kosovo, in Article 10 provides that this Law "*shall enter into force fifteen (15) days after publication on the Official Gazette of the Republic of Kosovo.*"

58. The Court further notes that the Law No. 04/L-273 on Amending and Supplementing the Law Related to the Mandate of the European Union Rule of Law in the Republic of Kosovo, was promulgated by the decree of the President of Kosovo, on 7 May 2014, and that it entered into force on 22 May 2014.

59. Based on the foregoing, the Court concludes that the Applicant's allegations regarding *„improper composition of the Appellate Panel, which is contrary to the law"* are based on the article of the Law that had no legal effect on 22 May 2014, and that the Appellate Panel was composed after this date pursuant to the amended law.

60. The Court further concludes that the Appellate Panel at the time of rendering decision was composed in accordance with applicable law and its amendment and supplement, as well as with Article 31 of the Constitution.

61. Based on the above, the Court concludes that the Applicant's allegations regarding *„improper composition of the Appellate Panel, which is contrary to the law"* are ungrounded and that the proceedings before the Appellate Panel did not violate Articles 31 and 32 of the Constitution.

(ii) Alleged violation of Article 46 of the Constitution

62. The Applicant further alleges that *„first and second instance panel committed discrimination without adequate assessment of facts and evidence and without taking into account UNMIK regulations"*, and in this way, according to the Applicant's allegations, Article 46 of the Constitution was violated.

63. Applicant's allegations are based on Article 5, paragraph 4 of UNMIK Regulation 2002/12 on the Establishment of the Kosovo Trust Agency, which provides as follows:...

> *„A re-registration or merger of a Publicly-owned or Socially-owned Enterprise after 22 March 1989 shall affect its status as a Publicly-owned or Socially-owned Enterprise only if such re-registration or merger was:*
>
> *(a) Based on Applicable Law; and*
> *(b) Implemented in a non-discriminatory manner."*

64. The Applicant alleges that *„none of* (Specialized and Appellate) *panels took into consideration the fulfillment of both requirements under Article 5.4 of UNMIK Regulation 2002/12. In fact, both panels exceeded its powers because they analyzed whether the merger procedure was carried out in accordance with the laws on privatization ... "*

65. The Court notes that the Specialized Panel precisely under Article 5.4 of UNMIK Regulation 2002/12 assessed the legality of the merger procedure of 4 November 1992 between JSC Sintelon and SOE „Fazita".

66. The Specialized Panel held that *„the merger was of type of „taking" [...] was a classic example of privatization" and* concluded that, under the applicable law, Article 2 (1) of the Law on Trade and Disposal of Social Capital *"Agreement on the sale/ privatization of social property and capital should be concluded by Development Fund under Article 2 of the Law."*

67. The Specialized Panel found that the challenged contract was not concluded by the Development Fund and that the monetary *„funds collected did not belong to the Development Fund".* The Specialized Panel reached the conclusion that the merger took place in an unlawful manner.

68. The Court further notes that the Specialized Panel did not go into the assessment of the second requirement that the merger is carried out *„in a non-discriminatory manner"* because the Specialized Panel found that the first requirement (the legality of the merger) was not fulfilled.

69. The Specialized Panel found that the merger was made in an unlawful manner and that all actions after the *„unlawful decision"* on the merger by the Interim Authority of the SOE Fazita were legally invalid and produce no legal effect, regardless of how they were carried out.

70. The Court further notes that the observations concerning the correct application of the law that in the appeal proceedings, were also taken into consideration by the Appellate Panel, which found that the merger was unlawful even in the case of implementation of the Law on Enterprises, which by Article 14 provides that *„for the organization of the basic organization of associated labor, the workers decide in accordance with the Statute of the company."*

71. The Appellate Panel further examined Article 13 of the Statute of the SOE Fazita that regulates this matter and concluded that *„in the present case, the changes in the company are carried out in complete contradiction with Article 13 of the Statute of the company."*

72. The Appellate Panel concluded that the merger is unlawful and under the Law on Enterprises and the Law on Trade and Disposal of Social Capital.

73. The Appellate Panel concluded that *„in the present case, it is about a gift or the merging of the social capital SOE 'Fazita' in one joint-stock company in Serbia, which is a typical example of arbitrary and unlawful decisions."*

74. The Court concludes that in the proceedings before the regular courts there has been no violation of Article 46 of the Constitution and that the Applicant's allegations that *„the first and second instance panel found discrimination without proper assessment of facts and evidence..."* are ungrounded because the Specialized Panel and the Appellate Panel did not go into the assessment of the other requirement, whether the merger is carried out in *„a non-discriminatory manner."*

75. The Court notes that the Applicant is basically not satisfied with the outcome of the dispute and that it filed the same allegations also before the regular courts, where regarding the applicable law received the well reasoned reply given by the Appellate Panel on why the decision on the merger of the Interim Authority of the SOE Fazita is considered unlawful by the Law on Enterprises and the Law on Trade and Disposal of Social Capital.

76. However, the Court considers that the Applicant only mentions that there has been a violation of its constitutional rights, because, without explaining how and why the facts it presented constitute a violation of its constitutional right invoked by it. It has not provided any *prima facie* evidence which would point out to a violation of its constitutional rights (see *Vanek vs. Slovak Republic*, ECHR Decision, No. 53363/99 of 31 May 2005).

77. The Court reiterates that, in order to have a case related to a constitutional violation, the Applicant must substantiate and prove that the proceedings before the regular courts, viewed in their entirety, were not conducted in a fair manner and in accordance with the requirements for a fair trial, or that there were other violations of constitutional rights committed by the regular courts during the proceedings (see case: *Shub v. Lithuania*, No. 17064/06, ECHR, decision of 30 June 2009).

78. The Court further notes that the Applicant was given an opportunity that in various stages of the proceedings to present arguments and evidence that it considered relevant to its case. At the same time it had the opportunity to effectively challenge the arguments and evidence presented by the responding party and to challenge the interpretation of the law, as allegedly interpreted incorrectly, before the Specialized Panel and the Appellate Panel in the regular court proceedings.

79. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of factual findings or applicable law allegedly committed by the regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). An applicant must submit a reasoned allegation and a compelling argument when claiming that a public authority has infringed her/his rights and freedoms protected by the Constitution.

80. The Court further reiterates that it is not its task under the Constitution to act as a court of fourth instance, in respect of the decisions taken by the regular courts. The role of the regular courts is to determined facts, interpret and apply the pertinent rules of both procedural and substantive law. (See case *Garcia Ruiz vs. Spain*, No. 30544/96, ECHR, Judgment of 21 January 1999; see also case KI70/11 of the Applicants *Faik Hima, Magbule Hima and Bestar Hima*, Constitutional Court, Resolution on Inadmissibility of 16 December 2011).

81. The Court concludes that all the arguments of the Applicant that were relevant to the resolution of the dispute, were duly heard and duly examined by the courts, that the material and legal reasons for the decision it challenges were presented in detail and that the proceedings before the regular courts, viewed in their entirety, were fair.

82. The Court considers that the admissibility requirements as established by the Constitution, and as further provided by the Law and foreseen by the Rules of Procedure have not been met.

83. For the reasons above, the Court concludes that the Applicants did not substantiate and prove their allegations. Therefore, their referrals are as manifestly ill-founded and inadmissible on a constitutional basis.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Articles 20 and 48 of the Law, and Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, in the session held on 13 June 2016, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;

IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur

Robert Carolan

President of the Constitutional Court

Arta Rama-Hajrizi