



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

Prishtina, on 10 February 2014
Ref.no.:RK 545/14

RESOLUTION ON INADMISSIBILITY

in

Case no. KI186/13

Applicant

Kosovo Energy Corporation

**Constitutional Review of the Judgment of the Supreme Court of the
Republic of Kosovo Rev. no. 151/2013, of 5 June 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

Applicant

1. The Applicant is the Kosovo Energy Corporation (hereinafter: Applicant), duly represented by Mrs. Shukrije Miftari, Lawyer.

Challenged decision

2. The Applicant challenges the Judgment Rev. no. 49/2012 of the Supreme Court of the Republic of Kosovo, dated 3 June 2013 (hereinafter: Challenged Decision), which was served upon the Applicant on 28 July 2013.

Subject matter

3. The subject matter is constitutional review of challenged decision, in relation to alleged violations of Article 31 [Right to a Fair and Impartial Trial] and Article 102, paragraph 3 [General Principles] of the Constitution.

Legal basis

4. Article 113.7, in conjunction with Article 21.4 of the Constitution of the Republic of Kosovo (hereinafter: Constitution), Article 47 of the Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo, of 16 December 2008, entered into force on 15 January 2009 (hereinafter: Law), and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: Rules of Procedure).

Proceedings before the Court

5. On 28 October 2013, the Applicant filed the referral with the Court.
6. On 31 October 2013, the President of the Court, by decision GJR.KI186/13 appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, the President of the Court, by Decision KSH.KI186/13 appointed the Review Panel, consisting of Judges: Robert Carolan (Presiding), Almiro Rodrigues (Member) and Prof. dr. Enver Hasani (Member).
7. On 14 November 2013, the Court notified the Applicant with the registration of referral, and requested additional documentation. On the same date, the Supreme Court was also notified.
8. On 5 December 2013, the Review Panel reviewed the report of the Judge Rapporteur, and recommended to the Court the inadmissibility of the Referral.

Summary of facts

9. On an unspecified date, Mr. A. Th. (hereinafter: Employee) initiated in judicial proceeding on a labor dispute against the Applicant as employer.
10. The Employee was employed with the Applicant with a fixed-term contract.
11. On 11 December 2009, the Applicant issued a written warning (Minutes No. 1498) to the Employee, due to non-fulfillment of performance and failure in fulfilling job requirements.

12. On 2 April 2010, the Applicant notified the Employee (Decision No. 499/1) that the employment contract was to be terminated “*due to Article 11, item (ë), (ç), Article 11.4 item (b) of UNMIK Regulation no. 2001/27 on Essential Labour Law in Kosovo, and Article 8.1, 8.2 and 8.3 of the Regulation No. 3 on KEK District Operations.*”
13. On 6 April 2010, the employee filed a request for review of the Decision no.499/1 terminating working relationship.
14. On 12 April 2010, the Director of Supply Division (Decision no. 85) rejected the request of the employee to review the termination of his employment contract, without providing any reasons for such refusal.
15. The Employee filed a claim with the Municipal Court in Prizren, arguing that the abovementioned decisions were unlawful and requesting its annulment.
16. On 23 May 2011, the Municipal Court in Prizren (C. No. 309/2010) rejected as ungrounded the Employee’s claim.
17. The Employee filed an appeal with the District Court in Prizren, “*due to substantial violations of the contested procedure provisions, erroneous and incomplete determination of factual situation and erroneous application of the substantive law.*”
18. On 24 February 2011, the District Court in Prizren (Ac. no. 362/2011), rejected the complaint of the employee, and upheld the judgment of the Municipal Court in Prizren, thereby reasoning:

“Pursuant to the finding of the District Court in Prizren, the challenged Judgment does not contain essential violations of the provisions of the contested procedure pursuant to Article 182, paragraph 2 of the LCP, which this court takes care of ex officio. The challenged Judgment is clear, concrete and has no contradictions and contains sufficient reasons on all decisive facts in this legal matter. In its reasoning proper factual and legal acts are provided which are accepted as correct and legal by this court as well. ... Thus the rendered conclusions are grounded on the administered evidences and those not only have been correctly proven but also have been reasoned in full and clearly. The reasons that are provided in the challenged Judgment are accepted by this court as well.”
19. The Employee filed a revision with the Supreme Court. The Employee “*filed a revision due to essential violations of the contested procedure and erroneous application of the substantive law, with a proposal that the judgments are modified and the [Employee’s] claim is approved or that they are quashed and the matter is remanded to the first instance court.*”
20. On 5 June 2013 the Supreme Court of Kosovo (Rev. 151/2013), approved as grounded the Employee’s revision request, and modified the first and second instance courts’ judgments. The Supreme Court reasoned as follows:

“The Supreme Court of Kosovo, after reviewing the challenged Judgment pursuant to the provision of Article 215 of the Law on Contested Procedure (LCP) has found that: The Revisions are grounded.

Pursuant to this factual situation of the matter the Supreme Court found that such a legal stance of the lower instances courts cannot be accepted as correct and legal because pursuant to this court’s finding on the confirmed factual situation the material right had been erroneously applied when both courts found that the claimant’s statement of claim is not grounded and as such rejected it, which is why the Revision of the claimant and his authorized representative had to be approved as grounded, the challenged Judgments changed and the claimant’s statement of claim approved as described in the enacting clause of this Judgment.

The Supreme Court of Kosovo, finds as grounded the claims of the claimant and his authorized representative provided in the Revision that the lower courts did erroneously apply the material right against the claimant when they rejected the statement of claim to annul as illegal the Decisions on the termination of the employment contract, since due to these violations the respondent did not conduct a disciplinary procedure, because pursuant to the provisions of Article 112 of the Law on Employment Relation of Kosovo no.12/1989 that was applicable pursuant to UNMIK Regulation no.1999/24 until the Law on Labor of the Republic of Kosovo no.03/L-212 entered into force in December 2010, and with the provision of Article 99.1 repealed UNMIK Regulation no.2001/27 on the Basic Law on Labor in Kosovo. The respective amendments of the Law on Employment Relation in the SAP Kosovo of 1989 and the Law on Labor of 1977, provide that the authorized authorities are obliged to submit the request for initiating the disciplinary procedure within 8 days after being notified on the termination of the work duties, or any other violation of work discipline and its perpetrator, whereas pursuant to the provision of Article 113, paragraph 2 it is envisaged that prior to imposing the disciplinary measure of dismissal from work, the work leading authority respectively the appointed employee with special authorizations and responsibilities is obliged to interrogate the employee.

Pursuant to Article 11 of the employment contract established between the claimant as employee and the respondent as employer it is provided that the employment contract is terminated pursuant to Articles 11 and 12 of the Basic Law on Labor in Kosovo, the collective agreement and KECs Rules of Procedure.

Pursuant to Article 24 of the general collective contract it is envisaged that the disciplinary commission is appointed by the employer, respectively the competent authority with a general act of the employer, whereas the respondent with the Regulation on disciplinary and material responsibility rendered on 10.10.200. In part II of this Regulation defines in detail the provisions for the implementation of the disciplinary procedure. This Regulation was not repealed with Regulation no.3 of date 30.11.2009. Furthermore, the provisions of Regulation 2001/27 on the Basic Law on

Labor in Kosovo do not repeal the Law on Employment Relation no.12/1989 of the SAPK.

The Supreme Court of Kosovo, on the grounds of the reasons mentioned above and the data in the case file found that the claimant's statement of claim is grounded and since the lower instance courts have erroneously applied the material right the Judgments of those two courts had to be changed and the claimant's statement of claim as such approved as in the enacting clause of this Judgment."

Applicant's allegations

21. The Applicant claims that "the court adjudicated based on laws that were not in force, thus its judgment is unlawful and unfair and as such should be quashed. KEK J.S.C. is aware that the Constitutional Court of Kosovo does not act as instance IV, but it has constitutional jurisdiction to quash-annul any legal act of any authority if it finds that there are violations of legal provisions and constitutional ones, and which for the present case is not at all disputable that the legal provisions were violated by applying other acts that were not in force".
22. Thus, the Applicant alleges that the Challenged Decision violates its constitutional rights guaranteed by Articles 31 and 102.3 of the Constitution, as a result of the violation of Article 214.2 of the Law on Contested Procedure.
23. In addition, the Applicant states that "*pursuant to Article 113.7 and 21.4 of the Constitution of the Republic of Kosovo, it has legal right to request the assessment of legality of a decision of public authorities, since all legal remedies are exhausted, thus requires from the Constitutional Court of Kosovo that following the review of the same, approves as grounded by annulling Judgment of Supreme Court of Kosovo Rev.no.368/2011 of 2.5.2013.*"

Admissibility of the Referral

24. The Court first examines whether the Applicant has met all admissibility criteria as provided by the Constitution, and further specified by the Law and the Rules of Procedure.
25. In that respect, the Court refers to Articles 113.7 and 21.4 of the Constitution.

113.7 "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."

Article 21 [General Principles]

[...]

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

26. The Court also refers to Article 48 of the Law, which provides that:

“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.”

27. In addition, the Court also take into account Rule 36 (1) c) and Rule 36 (2) of the Rules of Procedure, which provide:

36(1) The Court may only deal with Referrals if:

[...]

(c) the Referral is not manifestly ill-founded.

36(2) The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:

(a) the Referral is not prima facie justified, or

(b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or

(c) the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution, or

(d) the Applicant does not sufficiently substantiate his claim.”

28. The Court notes that the Applicant alleges mainly: (a) the violation of Articles 31 and 102.3 of the Constitution, and (b) the violation of the legal provisions.

29. In relation to the Applicant’s allegations on the violation of Article 31 of the Constitution [Right to a Fair and Impartial Trial], the Court notes that the Applicant has not clarified how and why this specific constitutional right was violated by the challenged decision, which allegedly adjudicated *“by applying other acts that were not in force”*.

30. The Court notes that the right to fair and impartial trial encompasses a number of elements, and represents key components in protecting basic individual rights from violations potentially committed by courts or public authorities by their rulings.

31. In this regard, the Court refers to Article 31 [Right to a Fair and Impartial Trial] of the Constitution, which clearly provides that:

1. “Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.”

32. Article 6 of the European Convention on Human Rights (ECHR) also provides that:

“In the determination of his civil rights and obligations (...), everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

33. In this context, the Applicant does not accurately clarify how and why the allegation “*applying other acts that were not in force*” substantiates a constitutional violation of his fundamental right to a fair and impartial trial.
34. Moreover, the above extensive quotation of the decision of the Supreme Court shows that the challenged decision provided extensive and comprehensive reasoning of the facts of the case and of its findings.
35. Furthermore, the dissatisfaction with the decision or merely mentioning articles or provisions of the Constitution is not sufficient for the Applicant to build an allegation on a constitutional violation. When alleging violations of the constitution, the Applicant must provide a compelling and well-reasoned argument in order the Referral to be grounded.
36. In sum, the Applicant does not substantiate and prove that the Supreme Court, allegedly adjudicating “*based on laws that were not in force*”, violated his constitutional rights.
37. With regards to the Applicant’s allegations on the violation of Article 102.3 of the Constitution, “*courts shall adjudicate based on the Constitution and the law,*” the Court finds that the Applicant has yet again failed to argue the violation of such rights as provided by the Constitution in the aforementioned Article, since the Applicant has not brought any argument or presented any proof that the Supreme Court disrespected the provision in question.
38. In terms of the allegation by the Applicant on the “*violations of legal provisions*”, the Court finds that such allegations are of a legal nature, and as such they do not represent any constitutional ground of violation of fundamental rights guaranteed by the Constitution.
39. In fact, the Court the Court does not review decisions of the regular courts on matter of legality, nor does it review the accuracy of matter of facts, unless there is clear and convincing evidence that such decisions are rendered in a manifestly unfair and arbitrary manner.
40. Moreover, it is not the duty of the Court to decide whether the Supreme Court has appropriately reviewed arguments of applicants in resolving legal matters. This remains solely the jurisdiction of the regular courts. It is the duty of the regular courts to interpret and apply pertinent rules of procedural and material law (see, *mutatis mutandis, Garcia Ruiz v. Spain* [GC], no. 30544/96, paragraph. 28, European Court for Human Rights [ECtHR] 1999-I).
41. The duty of the Constitutional Court is to assess whether, during the proceedings of the regular courts, the courts have violated any fundamental rights as guaranteed by the Constitution.
42. As a result, the Court finds that the Applicant’s Referral does not meet the admissibility requirements, since the Applicant has failed to substantiate his allegation and submit supporting evidence on the alleged constitutional violation by the Challenged Decision.

43. Therefore, pursuant to Rule 36 (2) b) and d) of the Rules of Procedure, the Referral of the Applicant must be declared as manifestly ill-founded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, in compliance with Article 48 of the Law, and in compliance with Rule 36 (2) b) and d) and Rule 56 (2) of the Rules of Procedure, on 5 December 2013, unanimously

DECIDES

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

Judge Rapporteur



Snezhana Botusharova



President of the Constitutional Court



Prof. Dr. Enver Hasani