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

Prishtina, on 29 August 2014
Ref.no.: RK706/14

RESOLUTION ON INADMISSIBILITY

in

Case no. KI95/14

Applicant

N.P.P. "Adriatik - Commerce"

Constitutional review of the Judgment of the Supreme Court, E. Rev. no. 30/2013, of 9 December 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 and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is N.P.P. "Adriatik - Commerce", with its seat in the village Velekinca, Municipality of Gjilani, which is represented by Mr. Muhamet Shala, lawyer from Prishtina.

Challenged decision

2. The Applicant challenges the Judgment of the Supreme Court, E. Rev. no. 30/2013, of 9 December 2013, which allegedly was served on the Applicant on 3 February 2014.

Subject matter

3. The subject matter of this Referral is the constitutional review of the Judgment of the Supreme Court, E. Rev. no. 30/2013, of 9 December 2013, by which the Applicant alleges that its rights guaranteed by Article 21 [General Principles], Article 31 [Right to Fair and Impartial Trial], Article 53 [Interpretation of Human Rights Provisions], as well as by Article 6.1 [Right to a Fair Trial] of ECHR.

Legal basis

4. The legal basis of this Referral are Articles 113.7 and 21.4 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Articles 20 and 47 of the Law on the Constitutional Court of the Republic of Kosovo, no. 03/L-121 (hereinafter: the Law).

Proceedings before the Constitutional Court

5. On 26 May 2014, the Applicant filed the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 10 June 2014, the President of the Court, by Decision No. GJR. KI95/14, appointed Judge Snezhana Botusharova as Judge Rapporteur, and by Decision no. KSH. KI95/14, appointed the Review Panel, composed of Judges: Robert Carolan (Presiding), Almiro Rodrigues (member) and Prof. Dr. Enver Hasani (member).

7. On 10 June 2014, the Court notified the Applicant and the Supreme Court of the registration of Referral.

8. On 26 June 2014 Judge Kadri Kryeziu notified in writing the Court for his exemption from the deliberations for the period June-July 2014 until the Court decides regarding the allegations raised against him.

9. On 3 July 2014, the Review Panel considered the report of the Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

Summary of facts

10. The Applicant was in the obligational relationship with the insurance company "Siguria" in Prishtina (insurance policy 1500047, serial no. 00059, 5 January 2007), for property insurance from fire and other risks.

11. On 10 June 2007, the Applicant's property, the sponge factory, was caught on fire, which caused material damage in two of five sectors of this factory.

12. On 4 January 2008, the Applicant addressed the insurance company "Siguria", by a written request, for compensation of damage caused by the fire. The Applicant's request for compensation of material damage was filed based on the insurance policy no. 1500047, with serial no. 00059, of 5 January 2007. However, according to the claims of the Applicant's authorized representative, the insurance company "Siguria" did not fulfill its obligation for compensation of damage.

13. On 4 February 2008, the Applicant filed a statement of claim with the Municipal Court in Gjilan, but the court declared itself incompetent regarding the subject matter jurisdiction and remanded the case to the District Commercial Court in Prishtina.

14. On 19 November 2009, the Commercial District Court in Prishtina, by Judgment II. C. no. 127/2008 rejected the Applicant's statement of claim as ungrounded, by which he requested the compensation of the material damage by requesting the application of legal interest, from the day of filing the claim, until the final payment of the amount of the caused damage.

15. Against the Judgment of the District Commercial Court in Prishtina, the Applicant filed an appeal with the Court of Appeal of the Republic of Kosovo, (hereinafter: the Court of Appeal), due to substantial violations of the procedural provisions, erroneous determination of factual situation and erroneous application of the material law.

16. On 8 May 2013, the Court of Appeal rendered Judgment Ac. no. 85 /2012, by which rejected the Applicant's appeal as ungrounded and upheld the Judgment of the District Commercial Court in Prishtina, II. C. no. 127/2008, of 19 November 2009.

17. Furthermore, the reasoning of the rejection of the Applicant' statement of claim by the Court of Appeal is as follows:

> *"Due to the fact that no evidence was presented to determine what caused the fire in the claimant's business premises, there is no legal ground to compensate the material damage and the lost profit. The claimant was obliged, after the fire broke out, to obtain relevant evidence, through the competent court, to engage a respective expert and based on that evidence to confirm beyond any doubt the factual situation. The claimant did not provide any evidence during the first instance procedure or the appeal procedure which would make credible its statement of claim. Pursuant to provision of Article 221 of the LCP, it is provided that if the court on the ground of administered evidence cannot determine a fact with certainty, it will conclude by applying the rules of the burden of proof, and in present case the claimant has the burden of proof for the ground of the claim".*

18. The Applicant filed a revision with the Supreme Court, against Judgment of the Court of Appeal, Ac. no. 85 /2012, by requesting again the compensation of material damage and compensation of the lost profit, caused by the fire in the sponge factory.

19. On 9 December 2013, the Supreme Court rendered Judgment E. Rev. no. 30/2013, by which it rejected in entirety the revision filed by the Applicant.

20. In addition, the Supreme Court reasoned the rejection of revision as it follows:

> *"Setting from such a situation of the case, the Supreme Court of Kosovo finds that the second instance court acted correctly when it found that the claimant's appeal is not grounded and rejected it as such and upheld the first instance court's Judgment. In the said Judgment it also provided sufficient reasons for the decisive facts, which this court recognizes as well.*
>
> *The claims in the revision that the court had violated the provisions of the contested procedure since the enacting clause of the judgment is in contradiction to the reasoning, that the legal-civil rules have not been applied and that the relevant arguments and evidence, which impacted the court to render an ungrounded judgment without legal ground had not been determined correctly, the Supreme Court found them ungrounded, because in the revision it was not specified which part of the Judgment is alleged that the enacting clause is contrary to the reasoning. With regards to the assessment of the evidence, the Supreme Court of Kosovo found that the lower instance courts had correctly assessed the fact that the fire was not caused by a light bulb, as alleged by the claimant, which was the conclusion of the electro-technician expert M.V. who excluded the possibility that the cause of the fire was the heat emitted by the light bulb, who also grounded his opinion on the proven experiment.*
>
> *The fact mentioned in the revision that the court did not take into account the Report of the Directorate for Public Safety and Emergencies – Sector on Fire Prevention and Detection, who concluded that in the present case there are no purposeful elements, excluding the human factor, the Supreme Court of Kosovo assessed it, but the latter had no impact on rendering a different decision, as it did not confirm what was the cause of the fire in the claimant's business premises. Pursuant to Article 319, paragraph1 of the LCP, each litigating party is obliged to prove the facts on which it grounds its demands and claims, and pursuant to paragraph 2 of the same Article it is provided that the proof includes all important facts in rendering the decision. The fire broke out on 10.6.2007, whereas the claim was submitted to the Municipal Court in Gjilan on 22.2.2008, while the District Commercial Court received the claim on 11.4.2008, thus providing the evidence was necessary, because pursuant to Article 379 of the LCP, it is provided that such a possibility in cases when the obtaining of any evidence risks of getting lost or it becomes difficult, and the claimant did not use this opportunity. Therefore, the Supreme Court of Kosovo finds that the legal stance of the lower instance courts, that the claimant's statement of claim is not grounded, is correct and based on law, therefore the claims in the revision that the material law was erroneously applied, was found as ungrounded".*

Applicant's allegations

21. The Applicant alleges that the Supreme Court has violated its rights, guaranteed by the Constitution, because it has not summoned its representative to participate in the hearing, when reviewing the extraordinary legal remedy (revision). The Applicant also claims that it has not been summoned either by the Court of Appeal to participate in the hearing session, when reviewing the appeal filed against the first instance court judgment, in order to have an opportunity to comment on the facts and evidence, presented in this civil case. The Applicant alleges that by this, the principle of equality of arms has been violated in the proceedings, before these courts.

22. The Applicant alleges that the Court may apply its Judgment, in case KI108/10, *Fadil Selmanaj*, of 6 October 2011.

Admissibility of the Referral

23. The Court examines beforehand whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and further specified in the Law and the Rules of Procedure.

24. In the present case, the Court refers to Article 48 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 public authority is subject to challenge".*

25. In addition, Rule 36 (1) c) and 36 (2) d) of the Rules of Procedure, provides:

> *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:*
> *[...]*
> *b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights;*
> *[...]*
> *d) when the Applicant does not sufficiently substantiate his claim.*

26. The Applicant in this case alleges that Judgment of the Supreme Court, E. Rev. no. 30/2013, of 9 December 2013, has violated its constitutional right, guaranteed by Article 21 [General Principles]; Article 31 [Right to Fair and Impartial Trial]; Article 53 [Interpretation of Human Rights Provisions] as well as Article 6.1 [Right to a Fair Trial] of the ECHR.

27. As to the Applicants' allegation for violation of Article 31 of the Constitution [Right to Fair and Impartial Trial], the Court considers that the Applicant in the constitutional aspect has not substantiated by evidence, how and why, the Supreme Court has violated this specific provision of the Constitution.

28. The Supreme Court has reasoned its decision in a comprehensive manner, by responding to the Applicant's appeal in all issues raised before it (see the reasoning of Judgment of the Supreme Court, E. Rev. no. 30/2013, in paragraph 17, of this document).

29. As regards to the Applicant's allegation that the present case is similar to its Judgment, in case KI108/10, the Court considers that the factual and procedural circumstances of the Applicant's case differ significantly from the case the Applicant is referred to. In the present case, we have to do with a civil case, which was solved by the District Commercial Court. The latter summoned the litigating parties to provide their evidence, during the main hearing of the case, and heard them. However, the Applicant, unsatisfied with the outcome of the decision, used ordinary legal remedy, the right to appeal in the Court of Appeal, which upheld in entirety the decision of the first instance court. Against the decision of the Court of Appeal, the Applicant used also the extraordinary legal remedy (revision), but the Supreme Court by revision rejected its statement of claim.

30. In its Judgment, KI108/10, the Applicant was a party, according to administrative proceedings and won the case in the IOBK. The Municipality of Mitrovica initiated administrative conflict with the Supreme Court, the latter decided in favour of the Municipality of Mitrovica, by modifying the Decision No. 02 (285) 2008, of the IOBK, without notifying the interested party, which was directly affected by the Decision of the Supreme Court.

31. In addition, in the paragraph extracted from its Judgment, in case KI108/10, it is stated: *"In fact, the Municipality of Mitrovica filed a petition with the Supreme Court in the file case where the Applicant was already a party. Thus, the Applicant was a stranger to that petition, in spite of the fact that the petition impacted substantially on the determination of his civil rights. That conclusion is corroborated by Article 16 of the Law on administrative conflict which prescribes that the "the third person to whom the nullification of the challenged act would be in direct damage (interested party) has in the dispute the position of the party"*

32. As it can be seen, we are dealing with cases with completely different factual and procedural circumstances. Since the very beginning and up to the end, the Applicant had the capacity of the claiming party, in the regular proceedings, while the insurance company "Siguria", had the capacity of the responding party. Therefore, the Applicant's allegations that the Court of Appeal and the Supreme Court rendered the decisions denying the Applicant the opportunity to comment on facts and evidence, attached to the appeal and revision, cannot be considered as a violation of the right to a fair trial and equality of arms, as long as the Applicant has been provided many opportunities for challenging the responses to appeal, filed by the responding party, the insurance company "Siguria".

33. Furthermore, in the present case, the Court cannot act a court of fourth instance, regarding the judgment rendered by the Supreme Court. It is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis, Garcia Ruiz v. Spain*,

no. 30544/96, § 28, European Court on Human Rights [ECHR 1999-1).

34. In the present case, the Court cannot consider that the proceedings in the Supreme Court, which decision is challenged, were partial or in any way unfair or arbitrary (See, *mutatis mutandis, Shub vs. Lithuania*, ECHR Decision as to the Admissibility of Application Nr. 17064/06, of 30 June 2009).

35. Therefore, the Court finds that the Applicant has not substantiated and justified its allegation for violation of the right to fair and impartial trial.

36. Consequently, there is no logical and practical need to further review the other alleged violations, as summarized and included in the allegation for violation of the right to fair and impartial trial.

37. In sum, the Court concludes that the Applicant's Referral, pursuant to Article 48 of the Law and Rule 36 (1) c) of the Rules of Procedure is manifestly ill-founded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, in compliance with Rule 36 (2) b) and d) and Rule 56 (2) of the Rules of Procedure, on 3 July 2014, 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. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Snezhana Botusharova Prof. Dr. Enver Hasani