



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE  
УСТАВНИ СУД  
CONSTITUTIONAL COURT**

Prishtina, on 20 December 2017  
Ref. No.: AGJ 1177/17

## **JUDGMENT**

in

**Case No. KI138/15**

Applicant

**Sharr Beteiligungs GmbH LLC**

**Constitutional review of Judgment Rev. no. 116/2015,  
of the Supreme Court, of 17 June 2015**

### **THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO**

composed of

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

#### **Applicant**

1. The Applicant is Sharr Beteiligungs GmbH LLC, which is represented by Dastid Pallaska, a lawyer from Prishtina.

### **Challenged decision**

2. The challenged decision is Judgment Rev. no. 116/2015, of the Supreme Court of Kosovo of 17 June 2015, which rejected as ungrounded the Applicant's request for revision against Judgment of the Court of Appeal (Ac. no. 3128/2012, of 3 February 2015).
3. The challenged decision was served on the Applicant on 10 July 2015.

### **Subject matter**

4. The subject matter of the Referral is the constitutional review of the aforementioned Judgment of the Supreme Court, by which the Applicant alleges that his rights guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: ECHR) were violated.

### **Legal basis**

5. The Referral is based on Article 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 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

### **Proceedings before the Constitutional Court**

6. On 9 November 2015, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 8 December 2015, the President of the Court, by Decision no. GJR. KI138/15, appointed Judge Ivan Čukalović as Judge Rapporteur. On the same date, the President of the Court, by Decision no. KSH. KI138/15, appointed the Review Panel composed of Judges: Robert Carolan (Presiding), Almiro Rodrigues and Arta Rama-Hajrizi.
8. On 15 December 2016, the President of the Court appointed Judge Altay Suroy as a member of the Review Panel, replacing Judge Robert Carolan, who resigned from a position of a judge on 9 September 2016.
9. On 11 January 2016, the Court notified the Applicant about the registration of the Referral. On the same date, the Court sent a copy of the Referral to the Supreme Court.
10. On 4 September 2017, the Review Panel considered the report of the Judge rapporteur and unanimously recommended to the Court the admissibility of the Referral.

## Summary of facts

11. Based on the case file, it results that Mr. S. Z. (hereinafter: the employee) was employed as a “*Head of Accounting*”, in the ‘*SharrCem*’ from Hani i Elezit.
12. On 4 December 2008, based on Notice No. 712, the Applicant notified his employee about the termination of his employment relationship because “*he has unlawfully misappropriated money from the salaries he was obliged to pay to the Applicant’s employees*” by misusing the position of the Head of Accounting.
13. On an unspecified date, the employee addressed the Municipal Court in Kaçanik with a statement of claim regarding the annulment of the notice for termination of employment relationship and reinstatement to his working place.
14. On 13 April 2010, the Municipal Court in Kaçanik (Decision C. no. 214/08), obliges the Applicant to submit to the court the reply to the claim in writing within 15 (fifteen) days from the day of service of the claim.
15. On an unspecified date, the Applicant submitted a reply to the claim to the Municipal Court in Kaçanik which in ten points challenged the filed claim and attached to this reply as evidence the official extracts of “Raiffesen Bank”, which according to the Applicant proved that the claim filed against it was ungrounded.
16. On 24 January 2012, the Municipal Court in Kaçanik (Judgment C. No. 214/08), approved the statement of claim in entirety, obliging the Applicant to reinstate its employee to his working place in the position “Head of Accounting” with all rights arising from the employment relationship, obliging the Applicant to compensate the costs of the contested proceedings to his subordinate.
17. On 8 February 2012, the Applicant filed an appeal with the District Court against Judgment C. No. 214/08, of the Municipal Court in Kaçanik, claiming essential violation of the contested provisions, erroneous determination of facts and erroneous application of the substantive law, and on this occasion also raised the issue of the passive legitimacy of the party and the subjective identity of the Applicant.
18. On 3 February 2015, the Court of Appeal of Kosovo (Judgment Ac. No. 3128/12), rejected the appeal as ungrounded and upheld Judgment, C. no. 214/08, of the Municipal Court in Kaçanik.
19. On 23 March 2015, the Applicant filed a revision against Judgment, Ac. no. 3128/12, of the Court of Appeal of Kosovo with allegation of: “*Essential violation of the contested procedure provisions and Erroneous application of the substantive law*”. While in its request for revision, the Applicant has repeated the same allegations as they were in the Court of appeals emphasizing



that the lower instance courts didn't give any answers regarding the raised allegations.

20. On 17 June 2015, the Supreme Court of Kosovo (Judgment Rev. No. 116/2015) rejected as ungrounded the revision regarding the first part of the Judgment, C. No. 214/08, of the Municipal Court in Kaçanik that has to do with the annulment of the notice for termination of employment relationship, and in the second part related to the obligation of the Applicant to reinstate his employee to work.

### **Applicant's allegations**

21. The Applicant alleges that the regular courts have violated his right to fair and impartial trial, as guaranteed by Article 31 [Right to Fair and Impartial Trial] because the court decision was not reasoned stating further that *"As a consequence of the lack of justification, the challenged decision deprived the Applicant of the right to legal remedies"*, and with it were violated his rights guaranteed by Article 32, and as a result of these violations, the Applicant's right to property under Article 46 [Protection of Property] of the Constitution was violated. The Applicant also asserts that there has been a violation of Article 6 [Right to a fair trial] of the ECHR.
22. In its Referral, the Applicant complains about erroneous application of the substantive law by regular courts. In addition, it also alleges erroneous determination of the factual situation, noting that *"at the time when the First Instance Decision was issued the Applicant has already closed his activity as a tenant of Cement Factory "SharrCem" in Hani Elezit. This due to the fact that, on December 2010, Cement Factory "SharrCem" was privatized from "Titan" Group headquartered in Athens"*. In this respect, it alleges that:
  - "-the Challenged Decision did not consider at all that the entity whom the First Instance Decision "SharrCem" LLC was addressing to, was different from the legal entity addressed to on the Second Instance Decision, Sharr Beteiligungs GmbH.*
  - the Supreme Court legitimizes serious violation of the substantive law according to which the private enterprises are obliged to apply AD No. 2003/2 on the Civil Service even though this legal instrument exclusively applies to civil servants [...].*
  - Challenged Decision also failed in addressing the factual allegations [...]"*.
23. The Applicant concludes by requesting the Court to declare invalid the Judgment, Rev. no. 116/2015, of the Supreme Court of Kosovo and to remand the case for retrial.

## **Admissibility of Referral**

24. The Court first examines whether the Applicant has met the admissibility requirements laid down in the Constitution, and as further specified in the Law and the Rules of Procedure.

25. In this regard, the Court recalls Article 113.1 and 113.7 of the Constitution which establish:

*“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”.*

26. The Court also refers to Article 48 of the Law, which stipulates 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 recalls Rule 36 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.”*

28. Regarding the above, the Court finds that the Applicant has submitted an individual referral, it has the capacity of an authorized party, has filed the referral within the time limit prescribed by Article 49 of the Law, and after exhausting all legal remedies. Therefore, the Court considers that all formal admissibility requirements have been met, in order for the referral to be reviewed by the Court.

## **Assessment of the merits of the case**

29. First, the Court recalls that Article 53 [Interpretation of Human Rights Provisions] of the Constitution obliges the Constitutional Court that the *“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.”*

30. The Court notes that the Applicant's main allegation regarding the violation of the human rights is related to Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 [Right to fair trial] of the ECHR and according to the Applicant, this violation caused also the violation of Article 46 [Protection of Property] of the Constitution, because the court



decisions were not sufficiently reasoned. The constitutional and ECHR provisions that are contested have the following content.

*Article 31 [Right to Fair and Impartial Trial]*

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

2. *Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.*

[...]

*Article 6 ECHR*  
Right to a fair trial

1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."*

[...]

31. The Court reiterates that, in principle, while reviewing allegations regarding the violation of the right to a fair and impartial trial, it also examines whether the court proceeding in its entirety was fair and impartial, as stipulated in Article 31 of the Constitution (see, inter alia, *mutatis mutandis*, *Edwards vs. United Kingdom*, 16 December 1992, p. 34, series A. no. 247 and *Vidal vs. Belgium*, 22 April 1992, p. 33, series A, no. 235).
32. In the present case, the Court notes that the regular courts obliged the Applicant to reinstate a former employee, dismissed due to alleged disciplinary violations, to his previous working place, thereby declaring unlawful all Applicant's legal actions related to the case.
33. In light of the claims made by the Applicant and the reasoning given by the regular courts, the Court considers that it is the task and full jurisdiction of the regular courts to determine the factual situation and assess evidence of the

case, and that the Constitutional Court exceptionally, in specific cases, intervenes only when the regular courts, through their actions, violate the right to fair and impartial trial (Article 31 of the Constitution) – right a fair trial (Article 6 of the ECHR). In these cases, the Court analyzes the facts and circumstances to the extent that they affect the rights and freedoms provided by Articles 31 and 32 of the Constitution.

34. Regarding the above, the Court finds that the Applicant alleged that the Judgment Rev. No. 116/2015, of 17 June 2015, of the Supreme Court regarding the revision has not respected the standard of reasoning of the court decisions and as such it contradicts the guarantees of Article 31 of the Constitution and Articles 6 of the ECHR.
35. In this regard, the Court emphasizes that the right to fair and impartial trial, guaranteed by Article 31 of the Constitution, includes also the right to have a reasoned judicial decision. The reasoning of decisions is an essential element of a fair decision. The function of a reasoned decision is to demonstrate to the parties that they have been heard and affords a party the possibility to appeal against it. It is only by giving a reasoned decision there can be public scrutiny of the administration of justice (see case of the Constitutional Court, KI72/12, Applicant, *Veton Berisha*, and Judgment of 17 December 2012).
36. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see *Hirvisaari vs. Finland*, ECtHR Judgment, 27 September 2001, par. 30).
37. In the present case, the Court notes that the Municipal Court in Kaçanik, in the reasoning of its Judgment, among others, stated: *"The Court approved the statement of claim of the claimant as grounded and obliged the respondent to reinstate the claimant to the working place where he has been working before, because the claimant did not cause the respondent "SharrCem" any damage by his actions, the respondent did not conduct the foreseen legal procedure, it could have imposed any lenient measure on the claimant rather than the termination of the employment relationship, such as: verbal warning, written warning, prohibition to increase the salary for one year, prohibition of advancement and reduction of personal income and not to impose the final measure termination of the employment relationship, then, the disciplinary commission of the respondent should have decided regarding this measure and not the ad hoc committee."*
38. The Court notes that the Applicant challenged the claim as being premature by filing a reply to the claim and submitted to the Municipal Court in Kaçanik the entire case file of the disciplinary proceedings conducted against its employee, but the Applicant's allegations in his reply to the claim were not addressed at all by the Municipal Court Judgment.
39. In addition, the Court finds that the Applicant following the Judgment of the Municipal Court, besides the formal grounds of appeal, had challenged that Judgment as to the substance as well, by stating in the appeal that the



Judgment of the Municipal Court: a) was addressed to and obliged a legal entity that was not a party to the contested proceedings, and b) did not contain factual and legally coherent grounds on which it was rendered. In addition, in its appeal, the Applicant explained that the Municipal Court in Kaçanik had erroneously applied the provisions of the Basic Law on Labor when it found that the disciplinary procedure was obligatory and provided by law.

40. In its Judgment Ac. No. 3128/12, the Court of Appeals of Kosovo after reviewing the Applicant's appeal decided to reject the appeal by reasoning that *"[...] this Court has considered the conclusion of the first instance court and has found that it is fair and grounded, it is substantiated on the administered evidence and on the case file and the justifiable reasons have been given, which are also approved by this court [...]"*  
*This court also considers that the first instance court did not violate the provisions of the contested procedure, of which this Court acts ex officio, and that it has ascertained the factual situation correctly and completely and has also applied the substantive law correctly [...]."*
41. The Court finds that the Applicant had filed the request for revision with the Supreme Court by maintaining its stance as already expressed before the lower instance courts and, among others, clearly stated in the request that the legal entity Sharr Cem LLC, which was obliged and addressed by the appealed Judgment, was registered as a limited liability company on 12 November 2012, almost 2 (two) years after the claim in this contested matter had been filed. The separate personality of Sharr Cem LLC from that of the respondent is also confirmed by the fact that Sharr Cem LLC has a different business number, namely 70708396, and a different fiscal number, namely 600653754, from that of the respondent.
42. In its request for revision, the Applicant has also clearly stated that this issue raised with the first and second instance courts, in addition to not being corrected by the Court of Appeals, it was not addressed at all.
43. The Court notes that the Supreme Court by the challenged Judgment decided to reject the request for revision regarding the first part of the court decisions of the first and second instance, dealing with the annulment of the Applicant's decision on termination of employment relationship to its former worker, while in terms of the Applicant's obligation to ensure to the worker *"all the rights and obligations arising from the employment relationship"* the court decisions of the lower instances were quashed and remanded for retrial, considering as unclear and indefinable this part of the decisions.
44. The Court finds that the Applicant throughout the court proceedings, in each court instance when using legal remedies for appeal, which are elaborated in more detail above, had repeatedly raised the issue of establishing the passive legitimacy of the party to the proceedings (the principle of the disposition according to the Applicant), alleging that the sued entity (the Applicant) and addressed in the decision of the first instance, and the sued entity in subsequent instances are not the same and they are entirely separate. The Applicant also alleged that the courts of different judicial instances have



determined in different ways, even contradictory, the factual situation without clarifying the key fact if there was or not the disciplinary proceeding against the former employee of the Applicant as well as the fact which was the law in force and which law should be used in this case.

45. From the content of the Judgment of the Supreme Court it is noted that one of the key allegations, namely the one concerning the legitimacy of a party, was addressed by the Supreme Court only superficially with one sentence, while the issue of the application of the law in force regarding the disciplinary proceedings was not addressed at all.
46. Regarding the first allegation, the Supreme Court stated *"This Court adds that the allegations regarding the subjective identity of the responding party are ungrounded, because in the enacting clause of the challenged judgment it was stated that: "The appeal of Respondent "SharrCem" – Sharr Beteiligungs GmbH, from Hani i Elezit, is rejected as ungrounded ...", which legal entity was also written in the challenged notice of the Respondent."*
47. From the above, it appears that the Supreme Court had not reviewed on merits the allegation stated by the Applicant that *"the first instance decision is addressed to and obliges a legal entity that did not exist at all at the moment when the Notice on Termination of Employment Relationship was issued and – as a consequence - did not participate at all in the contested procedure regarding this case."*
48. The Court considers that this issue is of essential character for the case, therefore its clarification is necessary, furthermore when the Applicant had stated and presented evidence for two separate legal entities, with different registration and fiscal numbers. From the court decisions it cannot be ascertained whether there was any legal act on the transfer or inheritance of obligations between two legal entities, so it is not clear whether in fact the addressed entity in the decision (in this case, the Applicant) is the one that should bear the legal obligations ordered by the court decisions.
49. Regarding the other Applicant's allegation concerning the issue of disciplinary proceedings against its former employee and the way of addressing this issue by the regular courts, the Court finds as follows:

The Municipal Court in Kaçanik, in Judgment C. no. 214/08 of 24 January 2012, reasoned that *"d) The Respondent terminated the employment relationship of the Claimant without conducting any procedure foreseen by law, and the Court confirmed this fact by Notice no. 712, of the Respondent, of 04.12.2008, wherein in the reasoning of the Notice is written that his employment relationship was terminated pursuant to the Report of ad hoc Committee, of 29.11.2008"*.

50. The Court of Appeal of Kosovo (Judgment Ac. no. 3128/12, of 3 February 2015) reasoned that *"Therefore, with regard to appealing allegations, such as the appealing allegation regarding the disciplinary procedure, this Court considers that they are ungrounded. This because by the Regulation 2001/27,*

*on Essential Labour Law in Kosovo, the disciplinary procedure was not foreseen, but this procedure was foreseen by Administrative Direction no. 2003/2, of the SRSG, on implementation of this Regulation, which procedure in the present legal – civil matter, as results by the case files, was not conducted at all.”*

51. The Supreme Court of Kosovo (Judgment, Rev. no. 116/2015, of 17 June 2015) concluded that *“The Supreme Court of Kosovo considers that the lower instance courts have applied the provisions of the substantive law correctly when they approved the statement of claim of the Claimant for annulment of the Notice on termination of the employment relationship and reinstatement to the working place, as unlawful, because also according to the assessment of this Court, the Respondent, in accordance with the legal provision under Article 11.5, in cases where Article 11.2 of the Essential Labour Law in Kosovo applies, item (b), a meeting shall be held between the employer and the employee, and at such meeting the employer shall provide the employee with an oral explanation of the grounds for termination.”*
52. The Court notes that the issue of possible disciplinary proceedings against an employee of the Applicant by the regular courts in three instances was addressed in different ways, so it is difficult to conclude from the court decisions whether or not followed a disciplinary procedure. Even if there was one, the legal basis on which it was conducted or should have been conducted is unclear. The Court considers that there are contradictory elements in the decisions of the courts of different instances regarding this matter, which anyway plays a crucial role in the final outcome of the dispute.
53. The Applicant raised in its request for revision the issue of completely wrong reference of the Court of Appeal to AD 2003/2, noting that this administrative direction does not serve for implementation of the Essential Labor Law but Regulation 2001/36 on Civil Service in Kosovo. As long as the former employee did not have the status of a civil servant, this AD does not apply at all in his case. Therefore, the Applicant alleged that this fact was decisive for rendering the judgment of that court, but the Supreme Court did not address this issue at all, but only concluded that *“the lower instance courts applied correctly the provisions of the substantive law.”*
54. While the possibility of divergence in case-law was an inherent consequence of any judicial system based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. However, the role of a supreme court was precisely to resolve such conflicts (See *SC Uzinexport S.A. v. Romania*, ECHR Judgment of 31 March 2015, par 29) see, *inter alia*, (*Zielinski and Pradal and Gonzalez and Others vs. France* [GC], no. 24846/94 and 34165/96) .
55. By assessing the process as a unique entirety, based on the reading of the judgment of the Supreme Court and judgments of the lower instance courts, the Court finds that the lack of fully addressing the allegations and giving adequate answers on three basic allegations made by the Applicant: passive legitimacy of the party; the issue of disciplinary proceeding against the



employee; and entirely erroneous application of the law, assessed as crucial issues of the process, constitute an insurmountable flaw of the content of the judgment and of the reasoning of the court.

56. Setting from what has been argued above, and based on the consolidated case law of the ECtHR, in this regard, in the present case under review, the Court considers that the Judgment of the Supreme Court, which rejected the revision, has not respected the constitutional standard of the reasoning of the court decision. Accordingly, the Court concludes that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6.1 [Right to a fair trial] of the ECHR.
57. Since the alleged violation of the right to property [Article 46 of the Constitution] was not sufficiently justified by the Applicant but it was only mentioned that it has occurred as a result of the violation to fair and impartial trial, the Court finds no reason to consider it as a separate allegation.

### **FOR THESE REASONS**

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law, and Rules 56 (1) and 74 (1) of the Rules of Procedure, in its session held on 4 September 2017, unanimously:

### **DECIDE**

- I. TO DECLARE the Referral admissible;
- II. TO HOLD that there has been a breach of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 [Right to a fair trial] of the European Convention on Human Rights;
- III. TO DECLARE null and void the Judgment Rev. no. 116/2015 of the Supreme Court of Kosovo, of 17 June 2015;
- IV. TO REMAND the Judgment of the Supreme Court for reconsideration in conformity with the Judgment of this Court;
- V. TO REMAIN fully seized of the matter pending the implementation of this Judgment;

VI. TO ORDER that this Judgment be notified to the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette.

VII. TO DECLARE this Judgment effective immediately.

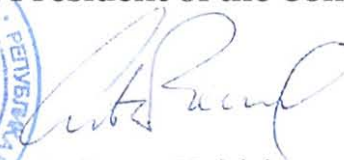
**Judge Rapporteur**



Ivan Čukalović



**President of the Constitutional Court**



Artur Rama-Hajrizi