Ac.nr. 1339/11

The District Court of Prishtine/Pristina, as the court of second instance with the panel consisting of EULEX judge Verginia Micheva-Ruseva, as the presiding judge and judges Gezim Llulluni and Shemsi Hajdini, members of the panel, in the dispute between the claimant MXh and the respondent the MG for compensation of damages, pursuant to the appeals of the claimant and the respondent against the judgment of the Municipal Court of Gllogovc/Glogovac in C.nr. 117/08, dated 27 September 2011, after a deliberation session held on 23 October 2012, renders the following:

JUDGMENT

The appeals of MXh and the MG, dated 27 and 28 October 2011, against the judgment of Municipal Court of Gllogovc/Glogovac rendered in C.nr. 117/2008, are hereby rejected and the judgment of the first instance is confirmed.

The request of the appellant MG for reimbursement of court expenses at second instance is hereby rejected.

Reasoning

1. THE PROCEDURAL HISTORY:

The dispute began with a claim lodged to the Municipal court of Gllogovc/Glogovac on 15 April 2005. It was once adjudicated by the Municipal court under C.nr. 73/2005. Upon an appeal of one of the parties District court of Pristina has dealt with the contest deciding to quash the first instance decision and return the case back for retrial (decision of 25.03.2008 in AC.nr.169/2006. Back in the Municipal court the contest was registered under C.nr.117/2008. On 17.09.2008 the procedure was suspended as the Ministry of Justice and the Ministry of Economy and Finance were notified about the dispute due to the requirement of Article 67 and 68 of the Law on Financial Management and Accountability (Law 03-L-048). EULEX took over the case in the first instance through a decision dated 08 December 2009. The Municipal Court of Gllogovc/Glogovac, as the court of first instance decided on 27 September 2011 with a judgment, by partially approving the claims. Against this first instance court judgment the respondent and the claimant timely filed their appeals on 27 and 28 October 2011, respectively. The appeals were sent to the parties for a reply to the appeal on 16 March 2012. EULEX took over the case in the second instance with a decision dated 9 February 2012.

2. THE CLAIMS AND THE POSITION OF RESPONDENT DURING THE FIRST INSTANCE PROCEDURE:

The claimant has lodged to the court the following six claims based on his allegations that the respondent had violated the Law on Obligation Relations ('Zakon o obligacionim odnosima' Official gazette of SFRY 29/1978, amendments in nrs. 39/85, 45/89, 31/93, art 154, mostly translated into English as the Law on the obligations and torts) by demolishing his property:
(1) Compensation for the destroyed business premises at an amount of 41.800 Euro, (950 Euro per m2, on the basis of the total surface of the shop, 44 m2 including the attics);
(2) Compensation for the lost inventory at an amount of 6.400 Euro;
(3) Compensation for lost profit at an amount of 600 Euro per month since 1 March 2005;
(4) Compensation for psychological suffering /immaterial damage at an amount of 7.000 Euro;
(5) Assignment by the respondent of an equal plot for business premises;
(6) Interest on the claimed amounts under 1, 2, 3 and 4 calculated on the interest for saving deposits in Kosovo banks.
Furthermore the claimant requested compensation of procedural expenses at an amount of 1004 Euro.

The respondent objected the claims stating that MG was fully entitled to clear the plot (including demolishing the shop) and did not violate any Law, since the contract signed between the parties foresaw that the owners had to remove their shops, if requested by the respondent. The respondent requested compensation of procedural costs at an amount of 611 Euro.

3. THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

Following the observations of the court of the first instance as well as the factual conclusions of Supreme Court of Kosovo in its judgment A.nr.19/2001 the following factual situation is established:
In 1997 the MG through a decision (nr.07 br. 353-95) dated 23.05.1997 granted a plot of land for temporary use referred to as Asanajka, cadaster parcel no 763, nr 51 in MG with a surface area of 22m2 to DB under the obligation to construct a shop on the said plot. On 06.10.1997 it also granted construction permission for the building. DB did not construct a shop but just a kiosk.
On 30.07.1997, DB sold the construction permission to the claimant MXh through an uncertified contract for an amount of 8000 German Marks (DEM). The claimant demolished the kiosk and constructed the business facility (a two floor shop, totally surface of 44m2) which he used for commercial purposes during several years.
Approximately sixty plots were allocated to individuals to construct business premises.
On 29 March 2001 the MG ordered the owners to remove the business facility. The claimant did not receive any official notification. He learned for this decision from the other owners of the

shops. He submitted a claim for obstruction of possession to the Municipal court of Gllogovc/Glogovac. By a decision dated 18.03.2005 in C.nr.36/2004 the court approved his claim.
DB did not appeal the decision of the MG.
On 1 and 2.03.2005 the MG demolished the business premises.
For clearance it shall be mentioned that some of the owners of business premises placed in the same area who had received the decision of the MG ordering them to demolish the buildings dated 29.03.2001 appealed this decision to the Chief Executive officer of the MG.
The Chief Executive officer did not decide on the appeal.
The owners appealed the Chief Executive officer silent omission to the Supreme Court of Kosovo.
The Supreme Court with a decision in case A.nr.19/2001 approved the lawsuit and ordered the Chief Executive officer to decide on the request of the owners.
Meanwhile a number of owners of shops also filed a claim to the Municipal court of Gllogovc/Glogovac against MG for obstruction of their possession.
The Municipal court approved the claim and imposed a temporary security measure forbidding the MG to demolish the shops (c.nr.53/2001 and c.nr.50/2001).
District court confirmed the decision of the Municipal court in Ac.nr.358/2001
The Ombudsperson of Kosovo requested United Nations Interim Administration Mission in Kosovo (UNMIK) to postpone the execution.
The Special Representative of the Secretary-General of UNMIK with an execution order 2001/6 dated 07.05.2001 postponed the execution.
The MG followed the UNMIK order and with a decision of 24.08.2001 postponed the execution.
On 25.02.2002 the Directorate for inspection in the MG issued a conclusion allowing the execution of the decision of 29.03.2001.
The Supreme Court of Kosovo in case A.nr.109/2002 dated 26.02.2004 annulled this decision of the Directorate for inspection.
On 5.05.2004 the Directorate for urbanism planning and environment protection within the MG again issued a decision annulling the decision of 15.11.1996 and ordering the owners to remove their business premises.
On 31.05.2004 upon appeal of the owners the Chief Executive Officer of the MG confirmed this decision.
On 19.10.2004 acting upon appeal of the owners, the Ministry of environment confirmed the decision of the Directorate for urbanism planning and environment protection of 05.05.2004.
The owners appealed this decision to the Supreme Court of Kosovo.
Nevertheless, on 28.02.2005 the MG ordered DB to clear the plot.
On 1.03.2005 with an urgent request the Ombudsperson of Kosovo requested the SRSG of UNMIK to intervene and suspend the execution until the Municipal court of Gllogovc/Glogovac decided on the obstruction of possession claim lodged by the owners of the shops against the MG.

On 1 and 2.03.2005 the MG demolished the business premises of the owners, including the shop in the current case.
On 21.03.2005 the Supreme Court of Kosovo in its judgment A.nr.443/2004 annulled the decision of the Ministry of environment and spatial planning.

II. RELEVANT LAW

According to the Constitutional Framework for Provisional Self-Government in Kosovo (UNMIK Regulation No 2001/9, 15.05.2001, amended by UNMIK Regulation 2002/9, 03.05.2002, in force until the Constitution of Kosovo was adopted in 2008), Chapter 3

> "3.1 All persons in Kosovo shall enjoy, without discrimination on any ground and in full equality, human rights and fundamental freedoms".
>
> 3.2 The Provisional Institutions of Self-Government shall observe and ensure internationally recognized human rights and fundamental freedoms, including those rights and freedoms set forth in: The Universal Declaration on Human Rights; The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; The International Covenant on Civil and Political Rights and the Protocols thereto; The Convention on the Elimination of All Forms of Racial Discrimination; The Convention on the Elimination of All Forms of Discrimination Against Women; The Convention on the Rights of the Child; The European Charter for Regional or Minority Languages; and The Council of Europe's Framework Convention for the Protection of National Minorities.
>
> 3.3 The provisions on rights and freedoms set forth in these instruments shall be directly applicable in Kosovo as part of this Constitutional Framework. "

According to Chapter 9.4.2,

> anyone "claiming to have been directly and adversely affected by a decision of the Government or an executive agency under the responsibility of the Government shall have the right to judicial review of the legality of that decision after exhausting all avenues for administrative review".

According to Section 33 of UNMIK Regulation 2000/45 on self-government of municipalities in Kosovo, 11.08.2000,

> "Law and justice shall bind the administration of the MG, and in particular the human rights and freedoms contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto shall be observed. All administrative actions shall comply with the applicable law".

Section 2.4 provides that

> "Each municipality shall have its own legal status, the right to own and manage property, the capacity to sue and be sued in the courts, the right to enter into contracts and the right to engage staff".

Section 35 of the same UNMIK regulation provides:

"35.1 A person may file a complaint about an administrative decision of a municipality if he or she claims that his or her rights have been infringed by the decision. Complaints must be submitted in writing to the Chief Executive Officer or made in person at the office of the Chief Executive Officer within the period of one month from the complainant being notified of the decision.

35.2 The Chief Executive Officer shall re-examine both the legality of the decision and the administrative process by which it was reached. He or she shall give the complainant a reasoned response in writing within one month of the receipt of the complaint.

35.3 If the complainant is dissatisfied with the response of the Chief Executive Officer, the complainant may refer the matter to the Central Authority, which shall consider the complaint and decide upon the legality of the decision.

35.7 The rights set out in this section shall be additional to any rights that the person may have to refer an administrative decision to the Ombudsperson or to a court of law".

Furthermore, Section 36 provides:

"A person may seek relief in a court of law against decisions of a municipality, in accordance with the rules and procedures of the relevant court".

Section 47 stipulates the powers of the Special Representative of the Secretary General that shall be also mentioned for clarity:

"47.1 The Special Representative of the Secretary-General shall retain in full the authority given to him pursuant to United Nations Security Council resolution 1244. He shall retain the final decision-making authority concerning any provisions of the present regulation.

47.2 The Special Representative of the Secretary-General shall set aside any decision of a municipality, which he considers to be in conflict with United Nations Security Council resolution 1244 or the applicable law or which does not take sufficiently into account the rights and interests of the communities which are not in the majority in the territory of the municipality".

Subsidiary the administrative review of administrative decisions was regulated also by the Law on the administrative procedure (SFRY Official gazette, No 47, 15.08.1986). This Law was in force until 13.11.2006 when the new Law on the administrative procedure (Law N0 02/L-28) entered into force.

The judicial review of the administrative decisions is regulated by the Law on Administrative Disputes (Official gazette of the SFRY N04, 14.01.1977). If the aggrieved party is dissatisfied with the final decision of the administrative authority a judicial appeal may be filed with the Supreme Court. A final administrative decision shall be considered one issued pursuant to an administrative appeal or a first instance administrative decision against which no administrative appeal is allowed (Article 7). The procedure may be initiated within 30 days from the day when the administrative decision was served to the party (Article 24). If the Supreme Court finds the submission admissible it may annul the challenged administrative act and instruct the

administrative authorities how to act or may issue a judgment of a substitutive character replacing the original administrative act.

Article 17 of this law stipulates that:

> "The complaint, as a rule, does not prevent exercise of the administrative act against which it has been lodged.
>
> Upon the plaintiff's request, the body whose act is exercised, i.e. the body responsible for its execution in the case of an act issued by a body not being authorised for its execution, shall postpone the execution until reaching the final court decision, if the execution of the act would cause irreparable damage for the plaintiff and the postponement would not either be in contradiction with the public interest or cause greater irreparable damage to the opposing party. Together with the request for postponement evidence on the lodged complaint should be enclosed. For each request the competent body need to bring in a decision at the latest within 3 days from receiving the request.
>
> The body under paragraph 2 of this article may postpone execution of the relevant act until the final court decision for other reasons as well if the public interest allows that."

As to the legal ground on which the claimant was granted with the right to use the land, the Court recalls Article 14 of the Law on Land for Construction (Official gazette of SAP Kosovo, No 14/80):

> "The Municipality may give non-constructed urban land for construction, on which it has the right of disposal, and contracted land in common use on temporary use for temporary needs".

According to Article 20.3 of this law:

> "Persons who obtain the use of the parcel for construction, are obliged, within the term of 3 years from the day they receive the decision, to construct the building, or to finish substantial work".

According to Article 24 of the same law:

> "The owner of a building on urban land for construction has the right to use the land under the building and the land that is necessary for its regular use, within the borders of construction parcel.
>
> The right to use the land referred in paragraph 1 of this article continues as long as the building exists.
>
> If the building from paragraph 1 of this article is no longer appropriate for use, due to age or damages incurred due to *vis major*, the owner of the building will be granted a priority for construction on the same parcel according under the conditions provided for in article 18 of this Law.
>
> The right to use land referred to in paragraph 1 of this article cannot be transferred at all".

As to the liability of the municipal authorities in negligence the Court recalls Articles 170-173 of the Law on Obligation Relations ('Zakon o obligacionim odnosima', OG SFRY 29/78) providing that enterprises, other employers and legal persons shall be liable for damages caused by its

employees or members, or brunches to a third person in performing their work or function or in connection to performing work or function.

According to the general rule set forth in article 154

> "whoever causes injury or loss to another shall be liable to redress it, unless he proves that the damage was caused without his fault".

Article 155 of the same law defines the injury or loss as a diminution of someone`s property (simple loss) and preventing its increase (profit lost) as well as inflicting on another physical or psychological pain or causing fear (non-material damage or mental anguish).

Article 185 regulates the restitution and indemnity in form of money:

(1) "A responsible person shall be liable to re-establish the situation existing prior to the occurrence of damage.

(2) Should re-establishing of the previous situation fail to eliminate the damage entirely, the responsible person shall be liable to pay an indemnity in money to cover for the rest of the damage.

(3) Should restitution be impossible , or should the court find it necessary for the responsible person to do so, the court shall order such person to pay to the person suffering loss an adequate amount of money as compensation for loss.

(4) At the request of the person suffering loss, the court shall award compensation in money to him, unless the circumstances of the specific case justify the restitution".

Article 186 provides when duty of compensation is due:

> "Compensation for damage shall be due from the moment of the damage taking place".

According to article 189:

(1) "A person sustaining damage shall be entitled both to indemnity of common damage and compensation of profit lost.

(2) The amount of damages shall be determined according to prices at the time of rendering court decision unless something else be ordered by law.

(3) In accessing the amount of the profit lost the profit which was reasonably expected according to the regular course of events or particular circumstances, and whose realization has been prevented by an act or omission of the tort-feasor shall be taken into account".

Article 190 stipulates that:

> "While also taking into account the circumstances after the occurrence of damage, the court shall determine damages in the amount necessary to restore the material state of the person sustaining damage into the state it would have been without the damaging act or omission".

As for the non-material damage the law stipulates the following in article 200:

(1) "For physical pains suffered, for mental anguish suffered due to reduction of life activities, for becoming disfigured, for offended reputation, honour, freedom or rights of personality, for death of a close person, as well as for fear suffered, the court shall, after finding that the circumstances of the case and particularly the intensity of pains and fear,

and their duration, provide a corresponding ground thereof- award equitable damages, independently of redress the property damage, even if the latter is not awarded.

(2) In deciding on the request for redressing non-material loss, as well as on the amount of such damages, the court shall take into account the significance of the value violated, and the purpose to be achieved by such redress, but also that it does not favour ends otherwise incompatible with its nature and social purpose".

According to article 376:

(1) "A claim for damages for lost shall expire three years after the party sustaining injury or loss became aware of the injury or loss and of the tort-feasor.

(2) In any event, such claim shall expire after five years after the occurrence of injury or loss".

Article 1 of Protocol 1 to the European convention on Human rights, directly applicable in Kosovo in 2005 based on the Constitutional Framework for Provisional Self-Government in Kosovo, Article 3.3, reads as follows:

„Every natural or legal person is entitled to the peaceful enjoyment of his posessions. No one shall be deprived of his posssessions except in the public interest and subject to the conditions provided for by the law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a sate to enforce such laws as it deems necessary to control the use of property in accordance with the general interes or to secure the payment of taxes or other contributions or penalties."

4. THE JUDGMENT OF THE FIRST INSTANCE COURT

The Municipal Court of Gllogovc/Glogovac, as the court of first instance decided on 27 September 2011 with a judgment, by partially approving the claims.

(1) and (2) The court of the first instance partially approved the claim for the pecuniary compensation of the destroyed business premises (shop) at an amount of 6.600 Euro as well as the claim for the compensation of destroyed inventory in the shop at an amount of 1.500 Euro , and ordered these two amounts to be paid together with the interest which is applied in accordance with the bank deposits for savings for over one year time, counted from the date 15 April 2005, when the lawsuit has been filed until the final payment.

The court accepted that the respondent acted against the law and justice thus in contradiction to section 33 of the UNMIK Regulation 200/45 on the self-government of municipalities in Kosovo. The administrative procedures to terminate the contract with the claimant and to have the plot cleared were not finalized when the demolishment of the shop took place. The MG did not take into account the interests of the shop owner while executing its power. Moreover the MG failed to announce a deadline when the plot would be cleared and also failed to announce the date on which the MG would clear the plot by demolishing the premises. Thus the respondent deprived the claimant from the option to remove his property and inventory. The court concluded that the demolition of

the shop is a clear violation of the property rights of the claimant as protected by Article 1 of Protocol 1 to the European Convention of Human rights. Regarding the amount of compensation, the court of first instance expressed the opinion that that it was not possible any more to established the exact amount of damage caused by the demolition as well as the value of the inventory due to the long time passed since 2005. The court calculated the approximate construction costs at the time of the construction and did not take as a base the commercial value of the shop, because according to the applicable conditions between the parties, the user did not have the right to sell the premises. As to the lost inventory the court accepted that there was no evidence for destroyed inventory, neither was this damage specified in the claim. The court approved the compensation claim considering that the respondent did not dispute the fact that the claimant had inventory in the shop when it was demolished, and granted compensation amount equal to the price of the inventory which any shop of that size could have.

(3) The court of the first instance rejected as ungrounded the claim for compensation for lost profit, since it decided that was incompetent to decide about the legality of the administrative decision to terminate the contract. The court accepted that the respondent would be liable for the compensation of lost profit only when the decision for termination would be illegal, which could be decided only in an administrative procedure.

(4) The court of the first instance partially approved the claim for compensation of immaterial damages at an amount of 250 Euro. The court accepted that demolishment of the shop and the inventory had caused psychological suffering to the claimant. As the amount due could not be precisely established the court of first instance allotted a symbolic amount of 250 Euro.

(5) The court of the first instance rejected the claim for assignment of an equal plot for business premises as ungrounded as there was no obligation for the respondent to offer the claimant another equal plot of land. In addition, the court accepted that the issue of the assignment of a new plot would depend from the legality of the decision to terminate the contract, which constituted a matter for which the court was of the opinion that it was incompetent.

(6) On the last claim regarding granting interest for claims 1, 2, 3 and 4, the court of first instance decided in its decision on each of the above mentioned claims, and granted interest for claims 1 and 2 whereas rejected the requested interest regarding claims 3 and 4.

The first instance court ordered the respondent to cover the procedural expenses, including the reimbursement of the paid court taxes because according to the court the activities of the respondent gave rise to the dispute.

5. THE CONTENT OF THE APPEALS ON THE JUDGMENT OF FIRST INSTANCE COURT:

The claimant filed an appeal because of essential violation of provisions of contested procedure, wrong verification of factual situation and wrong application of substantial law, requesting from the second instance court to change the judgment of the first instance court and decide on the merits of the case, as per his claim. Specifically, the claimant claimed in his appeal that the provision of Article 182.2 of the Law on Contested procedure has been violated, because its enacting clause is unclear and contradictory with the reasoning and it does not contain decisive facts, [and] the judgment is not sufficiently reasoned with the evidence and that there are contradictions between the reasoning of the judgment and the content of the evidences. More specifically, the claimant challenged the amounts decided by the first instance court in the partially approved statements of the claim (1, 2, 4, 6), as well as the decision of the court to reject statements 3 and 5 of the claim. The claimant stated that the amounts due were fully specified during the first instance procedure, including three expertizes. The claimant considers that the decision of the first instance court is unjust.

The respondent filed an appeal against points 1, 2 and 4 of the judgment of the first instance court, as well as against the decision on procedural expenses because of essential violation of provisions of contested procedure, wrong verification of factual situation and wrong application of substantial law, requesting from the second instance court to annul points 1, 2 and 4 of the judgment, as well as the decision on procedural expenses and remit the case for retrial to the court of the first instance. The respondent claimed that the first instance court violated Article 182 (n) of the Law on Contested Procedure, because the enacting clause of the judgment is contradictory with the facts, respectively with the documentary evidence, because according to this evidence it is clear that the land has been given to the claimant in temporary use, as well as it does not stand that the respondent did not take any administrative activity in administrative procedure for destroying the shop. The respondent further claimed that the wrong establishment of the factual situation consists on the fact that according to Articles 154.1 and 158 of the Law on Obligations, in order to establish the responsibility for the caused damage there must exist a damage due to illegal and not allowed action, whereas the activities of the respondent were legal, since they were undertaken in accordance with the Law on general Administrative Procedure. The land was given to DB and not to the claimant and the transfer of the right to use was done in contradiction to the law. Therefore the claimant does not possess the legitimacy to appear in the procedure as he was not the legal holder of the right to use the land. The claimant also did not use the administrative remedies, as he was not a party in the administrative procedure. Since the shop was not removed from the plot after the order of the respondent, the latter removed the shop in accordance with the applicable provisions. The statement of the first instance court that the claimant was not given time to clear the plot is not correct, because the activity to destroy the shops was undertaken in order to execute the decision on annulment of the decision to allocate plots and this decision was served to the owner of the facility. The Law on Basic Property Relations specified that ownership right could not be acquired over socially owned property, thus also not over construction land which was a socially owned property. The respondent also stated that the court of first instance wrongly established that the provisions of Protocol 1 of the

Convention on Human Rights were violated, because the administrative procedure was carried out in accordance with Article 6 of the said Convention, which means that there was a public interest involved for clearing the plots. Finally, the respondent objects the claim and the statements of the claim because it considers that the court does not have a real competence to decide in this matter, since it considers it as an administrative issue, which belongs to the competence of the Supreme Court in the administrative dispute. Therefore, the respondent considers that the claim should have been dismissed due to the incompetence of the court.

6. DISTRICT COURT ASSESSMENT

A. Admissibility

Before entering into conclusions on the merit the Court shall consider *ex officio* the admissibility of the claim. The claimant, alleging to be owner of a business facility and inventory, both demolished and destroyed by the respondent has the legal interest to submit the claim. The Respondent, MG has procedural capacity to respond to the claim as according to UNMIK Regulation 2000/45 on self-government of municipalities in Kosovo (applicable in 2005), Section 2.4 the MG has its own legal status and could be sued in the court.

B. The merits

First of all the court has to examine whether the circumstances of the case, considered as a whole, conferred on the claimant to receive compensation and secondly, if positive, which law recognizes the liability of the MG as a legal person and local authority.
The claimant was not the owner of the business facility which was demolished by the MG. He had concluded a contract with the owner in 1997, paid 8 000 DM for the use of the plot and for the construction permits, in the same year he built business facility and used it as a shop until its demolishment in 2005. The law forbade the right to use the land to be transferred to a third party (see Article 24.4 of the Law on Land for Construction). Thus the contract concluded in 1997 between the owner DB and the claimant did not have any legal effect. The Court however considers that the claimant has at least become the owner of the building, while he has no legal right to use the land within the borders of the construction parcel and to run the facility as a shop.
In 2005, apart from the domestic law, international instruments including the European Convention of Human Rights were directly applicable. The Convention in Article 1 of Protocol 1 protects existing possessions and assets against interference. The right to temporary use the land, the right of ownership over a building and over movable items is considered by the convention as "possession". The European Court on Human Rights went even further in examining the circumstances in a case where property was held in possession contrary to national law or under a contract having no legal effect[1]. In Beyeler v Italy case the Court found an interest protected by Article 1 of the first Protocol on the bases that the applicant had been in possession of the

[1] See Beyeler v Italy, judgment of 5 January 2000

property for several years, even when his purchase contract was null and void under the national law, and the authorities had, for some purposes, treated him as having a propriety interest. The Court had the same approach in the case of Oneryildiz v Turkey[2] where it considered that the illegally constructed dwelling built by the applicant and his residence there with his family represented a substantial economic interest which the authorities allowed to subsist over a long period of time (8 years), and thus amounts to a "possession" within the meaning of Article 1 of protocol 1. The right under Article 1 of Protocol 1 includes the possibility to exercise those rights and this enjoyment is protected against interference by public and private entities. The interference may be in forms of deprivation or control of use, and must have a legitimate aim, satisfy the requirement of lawfulness and can be exercised with fair balance between the demands of the general interest of the community and the requirement of the protection of the individual`s fundamental rights.

Following these main principles and understanding of the ECHR this Court concludes that the claimant has the legal interest to ask for redress.

As for the liability of the MG the Court considers the following:

In 2005 Kosovo did not have special law engaging the responsibilities of the government and local self-governing authorities for damages caused to the citizens in negligence. Therefore, the general law of torts is applicable (the Law obligation relations, Official gazette SFRY 29/78) as it recognizes the liability of legal persons and enterprises for lost or damage caused by their staff while exercising functions or service.

The Court, after considering all administered evidence, finds that the MG had demolished the business facility of the claimant after arbitrary interference and with no effective respects of his property rights. The claimant was not notified about the order of the MG to remove the shop and release the land. The claimant was not given any possibility to appeal the decision of the MG. UNMIK Regulation 2000/45 on self-government of municipalities in Kosovo does not foresee immediate enforcement of the administrative decision without the exhaustion of all judicial control over the decision of the MG. The demolishment of the shop of the claimant shall be considered also in the light of all the activities undertaken by the MG in the implementation of the construction plan. In 1996-97 the MG allocated to individuals about 60 plots of land for temporary use obliging them to build business facilities. Most of the individuals followed the obligation, built shops and run business. In 2001 the MG decided to implement the construction plan for the town, to remove the shops and make a square on the place where the shops were built. Thus in 2001 most of the owners of the shops were notified that their allocation rights were annulled and they had to remove the shops from the plots of land. As already explained in 3.I of this judgment most of the owners appealed the decision of the MG – to the Chief Executive Officer, to the Supreme Court, to the Municipal Court, to the Special Representative of the Secretary-General of UNMIK, to the Ombudsperson. Nevertheless the MG demolished all the business facilities prior the finalization of the judicial control over the administrative decision ordering their removal. This situation required consideration by the local authority not only of

[2] Application No 48939/99, Judgment of 18.07.2002

the individual interest of the owners but also the public interest, as the demolishment of more than 20 shops before the Supreme Court allowed it could cause irreparable damage to more than 20 families of Gllogovac. The local authorities had the actual knowledge of the risk of damage to property if they acted before the decision of the Supreme Court but they neglected it. The damage to the claimant and other owners of shops was a reasonably foreseeable consequence. Additionally the MG breached its duty set forth in section 33 of UNMIK Regulation 2000/45 on self-government of municipalities in Kosovo to follow the law and to protect property, as a basic human right. There is no evidence that implementing the project of "Skenderbeu" square in Gllogovc/Glogovac was an urgency matter and required immediate vacation of the municipal land.

On 1 and 2 March 2005 the administrative case lodged by the owners of shops was still pending in the Supreme Court. The administrative dispute on the issues whether the land given to the owners in 1996-97 for temporary use shall be taken back by MG and respectively whether the owners of the premises built in this land shall be ordered to remove them was not finalized on 1 and 2 March 2005. The owners of more than 20 shops had appealed the decision of the Ministry of environment to the Supreme Court as the judicial body exercising judicial control over the administrative decisions of the MG. The MG did not wait for the decision of the Supreme Court but demolished all the shops constructed on the municipal land and thus acted against the principles of law and justice foreseen as a duty of the administrative body set forth in section 33 of UNMIK Regulation 2000/45 on self-government of municipalities in Kosovo. The MG was obliged to follow the applicable law, including the international standards which in 2005 were directly applicable in Kosovo (see art.3.3 of the Constitutional Framework for Provisional Self-Government in Kosovo). It is true that the Law on Administrative Disputes does not foresee explicitly staying the execution of the administrative decision challenged in front of the Supreme Court, but the MG was allowed by the law to wait until the final court decision was issued if the public interest required it (Article 17). This legal possibility for the MG shall be considered in the light of the general obligation of the MG to observe law and justice, and in particular the human rights and freedoms contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto (section 33 of UNMIK Regulation 2000/45 on self-government of municipalities in Kosovo). One of the basic human rights is the right to peaceful enjoyment of possession. The claimant was not an owner of the land; he was not granted the right to temporarily use it and to build a business facility on it. But he was owner of the building and actually run the shop for about 8 years. The MG allowed him to exercise this business activity and even in February 2005 notified the claimant that the shop was sealed due to lack of labor permissions. District court shares the opinion of the first instance court that the respondent caused material damage to the claimant by destroying his shop without even notifying him about any deadlines for voluntarily and forcible execution. The MG did not present any evidence that the claimant was notified about the execution. Thus he was deprived of the possibility to remove the facility and to take away the inventory. There is clearly a causal link between the actions of the MG and the destruction of the claimants' shop and inventory and

respectively the caused damages. The material damage caused to the claimant is the amount of his pecuniary lost – the value of shop as construction material and the value of the inventory in the shop. As the Municipal Court correctly pointed out the claimant could not sell the shop. The right to use the land is an individual right and cannot be transferred to third party (see Article 24.4 of the Law on Land for Construction). That is why the loss of the claimant would be measured not by the market value of the facility but by its construction value. Damages in tort are awarded to place the claimant in the position in which he would have been had the tort not taken place. There is no evidence as to the construction value of the shop and as to the existence and the value of the inventory requested by the claimant. Additionally too long period had passed from the demolishment of the facility and the inventory and no evidence was kept about their state. In such a case the judge can decide on the amount of the compensation following average reasonable measures and implying the principles of fairness. The requested amount of 41 800 Euro compensation for the 22 m2 shop (a temporary building) calculated as 950 Euro per m2 is too high and unjustified for a construction (not market) value for a temporary facility built in 1997. Same applies for the value of the alleged lost inventory. Damages place a monetary value on the harm done, following the principle of *restitutio in integrum* . The Court cannot award the claimant with compensation for which the respondent is not liable.

Regarding the claim for compensation of profit lost, the Court shares the opinion of the first instance court that the commercial activities in the shop were exercised by the claimant without any legal base. He cannot request for compensation of an illegally run activity. The respondent cannot be liable on this point. This claim was correctly rejected by the Municipal court as well as the claim for assignment of an equal plot for business premises. There is no legal ground to compensate the damage of demolished shop with assignment of a land.

The Court accepts that the demolishment activities of the MG caused psychological suffering and pain to the claimant. This damage shall be also compensated by the MG pursuant to Article 200 of the Law on Obligation Relations. The first instance court had ordered fair satisfaction to the claimant. The requested amount of non-pecuniary damages is too high and unjustified. The Court reminds the fact that the claimant knew that he was not owner of the land on which the shop was built, that the facility was temporary and one day the shop would be removed and the business activity closed. The compensation is granted for the shock he had suffered finding the shop demolished. The Court accepts that 250 Euros would represent fair compensation for the non-pecuniary damage sustained by the claimant.

Reparations for pecuniary damages shall be paid by the MG with the interest requested, counted from the day the claimant had requested them (the date the claim was filed with the court) until the final payment is done pursuant to art.186 of the Law on Obligation Relations. The legal interest over the non-pecuniary reparation, as decided by the Municipal Court, shall be paid from the moment of issuing the decision. Law on Obligation Relations does not foresee legal possibility to pay non-pecuniary compensation retrospectively from the moment the damage occur. Article 186 of the Law on Obligation relations concerns only pecuniary damages as its place in the law is in the chapter "Indemnity for damage to property". In the chapter "Indemnity

for non-material damage" (articles 199- 205) such a retrospective provision is missing. Additionally Article 205 specifies that only "provisions on separate liability and reduction of indemnity applicable to material loss shall apply accordingly to non-profit loss as well". Consequently the provision of Article 186 is not applicable for non-pecuniary damages, and interest over the awarded compensation cannot be granted.

To most of the remarks made in the appeals of both parties, the Court has already answered in its reasoning above. There are some issues to be added.

This court is not interfering in the legality of the MG to take back the land and implement another project. This court is not competent also to decide if the MG acted in public interest when terminating the contracts for temporary use of the land. This matter can be addressed and decided by the administrative court. As already cleared above this Court has to consider if the respondent had illegally demolished the shop of the claimant and if positive, what is the amount of the compensation the claimant shall be entitled to.

The Court does not share the opinion of the parties expressed in the appeals that the enacting clause of the challenged decision is in contradiction to the final facts. The conclusions of the first instance court are clearly and comprehensibly reflected in the enacting clause. The first instance court has acted according to its obligations set forth in article 8 of the Law on Contested Procedure (Law No03/L-006, Official gazette No38/2008) and has established the facts after conscientious and careful consideration of the evidence and the overall perception gained during the proceedings, as well as has examined each and every piece of evidence.

As to the issue of the challenged competence of this Court and the Municipal court, expressed by the MG, the panel shares the opinion already expressed by the first instance court on this issue in the appealed decision (page 5 of the English version of the decision).

As to the opinion of the claimant in his appeal that the Municipal court did not accept the conclusions of the expert in another similar case (XhP case, nr. 22/05 before the Municipal Court of Gllogovc/Glogovac) the Court reminds that in XhP case the expert JT provided conclusion as to the market value of a shop, probably similar to the shop of the claimant. The Court had already explained further up the reasons to reject market value as a base for the quantification of the pecuniary damages sustained by the claimant.

In the appeal the claimant through his legal representative states that the respondent started maltreatments against the claimant in 2001 and thus he has to be entitled to a higher compensation for immaterial damages. In his statements in front of the Municipal court the claimant stressed that he was not notified about the decision of the MG to vacate the land and he never remarked about any maltreatments of the MG against him. Additionally he did not present any evidence in this regard. Here the Court will recall the general rule in civil litigations, reflected in Article 7 of the Law on contested procedure, that each party have a duty to present all the facts on which his or hers claim is based, and to present evidence that establish those facts. The burden of prove lays to the claimant. The court cannot establish liability for the respondent on the base of allegations.

Furthermore, the claimant continues in the appeal that the first instance court unfairly rejected his claim under count 5 while it was mandatory to award him with a replacement of land where he could built another facility and provide income for his family. The claimant never specified in front of the court which is the legal ground for this claim. The law (the Law on Land for Construction) does not foresee such a possibility. Thus this claim is not legally successful.
Apart from the grounds indicated in the appeals, the Court *ex officio*, pursuant to Article 194 of the Law on contested procedure, examined any violation of the substantive law as well as any violation of the provisions of the contested procedure under Article 182 para 2 points b), g), j), k) and m) of the Law on Contested Procedure. There are no grounds for challenging the decision rendered in this dispute. The judgment of the Municipal court is upheld.
The request of the MG to be reimbursed to the procedural costs in front of the second instance is ungrounded as the appeal of the MG is not successful. That is why the Court rejects it.
As stated above, pursuant to article 200 of the Law on Contested Procedure, it is decided in accordance with the enacting clause of this judgment.

District Court of Prishtine/Pristina,
Ac.nr. 1339/2011 dated 23.10. 2012

Verginia Micheva-Ruseva	**Gezim Llulluni**	**Shemsi Hajdini**
Presiding judge	**Panel member**	**Panel member**