Up-699/12-25
17 January 2013

DECISION

At a session held on 17 January 2013 in proceedings to decide on the constitutional complaint of the Ankaran Municipality, represented by mag. Miha Šipec, attorney in Ljubljana, the Constitutional Court

Decided as follows:

Order of the Higher Court in Koper No. Cp 383/2012, dated 5 June 2012, is abrogated and the case is remanded to the same court for new adjudication.

REASONING

A.

1. In non-litigious civil proceedings the complainant filed an application to determine the relations between the alleged joint owners (the complainant and the Urban Municipality of Koper – hereinafter referred to as the UMK) of real properties in municipal ownership on the complainant's territory in such a manner that the alienation and encumbrance of these real properties would only be admissible if both municipalities gave their consent to such, and an application for an interim injunction by means of which the UMK would be prohibited from selling the mentioned individual real properties. The court of first instance rejected both applications, as the complainant allegedly did not have legal interest for its claim, while the court of second instance dismissed the complainant's appeal and confirmed the first instance order, however, for different reasons. It stressed that the admissibility of the complainant's application for judicial protection depended on the existence of the capacity to be a party to proceedings, which is a general procedural prerequisite. Without such capacity a court would allegedly not even be allowed to make a decision on the merits on a claim or application. The lack of capacity to be a party to proceedings is allegedly an obstacle to the issuance of a decision on the merits. In the opinion of the Higher Court, the complainant is not yet an entity under law, i.e. it has not yet attained legal capacity and therefore also not the capacity to be a party to proceedings, such entailing a deficiency that cannot be remedied. The Higher Court based this opinion primarily on the fact that while the complainant has already been

established, it has not yet, however, been constituted, therefore it allegedly has not yet attained the capacity to engage in legal transactions. The Higher Court deems that a legal entity attains legal capacity only after the realisation of the facts which a legal act determines as prerequisites for attaining the qualities of a legal entity, i.e. after the creation of an appropriate organisational structure by means of which an entity under law may function and fulfil its purpose.

2. The complainant asserts that the Higher Court violated its human rights determined by Articles 14, 22, 23, and 33 of the Constitution. It provides an extensive account of the reasons for filing an application to determine relations in non-litigious civil proceedings. The complainant states that the UMK wishes to “expropriate” it by means of disposing of real properties from its territory which are the undivided joint property of the complainant and the UMK. Thereby the economic basis that is essential for the complainant's functioning would allegedly be nullified to a large extent. The complainant believes that the standpoint of the courts denies it any possibility of judicial protection of its rights and property in the period between its establishment and the constitution of its authorities. It asserts that it was established by Constitutional Court Decision No. U-I-114/11, dated 9 June 2011 (Official Gazette RS, No. 47/11), on the day of the issuance of that Decision, and that on the same day it also obtained legal capacity, i.e. the capacity to be the subject of rights and obligations. The complainant stresses that in the case of the establishment of a new municipality which secedes from another municipality the property of the two municipalities becomes subject to a legal regime of undivided joint property, under which, in accordance with Article 51b of the Local Self-Government Act (Official Gazette RS, Nos. 94/07 – official consolidated text, 76/08, 79/09, and 51/10 – hereinafter referred to as the LSGA), transactions of regular asset management, including alienation, are subject to the condition of consent of both municipalities. As a consequence, on 9 June 2011 the complainant allegedly obtained the entitlements of a joint owner regarding the relevant municipal property. It states that the UMK is unilaterally selling real properties on the territory of the already established new municipality (which seceded from the UMK), which is alleged to be evidently legally inadmissible and arbitrary. In the complainant's opinion, in all other instances of undivided joint property the legal order recognises the right of joint property owners to demand the protection of their rights in relation to the other owners of such joint property in judicial proceedings (namely, in the procedure determined by Articles 112 to 117 of the Non-litigious Civil Procedure Act, Official Gazette SRS, Nos. 30/86 and 20/88 – corr. – NCPA). As the court allegedly denied such a right to the complainant by the challenged order and treated it differently than persons in an essentially equal position, it allegedly violated its right to equality before the law determined by the second paragraph of Article 14 of the Constitution. There was allegedly no reasonable justification for such differentiation. In the complainant's assessment, the fact that an entity which does not have the capacity to be a party to proceedings has no representative cannot entail that such an entity therefore remains without rights and without the possibility to enforce such rights in court. Due to the fact that in other instances when a natural person or legal entity who does not have the capacity to be a party to proceedings at a certain moment does not have a representative the legal order allegedly always ensures that their rights are eventually enforced through a statutory representative or a representative *ad litem*, the complainant was allegedly subjected to unequal treatment contrary to the Constitution in relation to such persons who do not have the capacity to be a party to proceedings, as well as in relation to persons who do not have the capacity to be a party to proceedings who are adequately represented, and in relation to entities possessing the capacity to be a

party to proceedings. The complainant also alleges a violation of the right to the equal protection of rights determined by Article 22 of the Constitution, as the proceedings in which such a right may be enforced did not even occur. The complainant's right to judicial protection determined by Article 23 of the Constitution was allegedly violated because [the complainant] was completely denied access to the courts, even though it already has substantive rights regarding the undivided joint property. Due to the challenged order, it could allegedly not defend such in court. In the complainant's opinion, the challenged Higher Court order transforms its property rights into rights that cannot be enforced in court and which are therefore open to unobstructed usurpation. The complainant takes the standpoint that the court should have provided it with access to judicial protection in the non-litigious civil proceedings by appointing a natural person who had the capacity to be a party to proceedings to represent it. It also mentions the procedural institutions determined in the third paragraph of Article 76 and in Article 82 of the Civil Procedure Act (Official Gazette RS, Nos. 73/07 – official consolidated text, and 45/08 – hereinafter referred to as the CPA), which are alleged to enable such. It asserts that the challenged orders also violated its right to private property determined by Article 33 of the Constitution, namely in connection with the undivided joint property which (as far as it consists of immovable property situated in the complainant's territory) the complainant allegedly reasonably expects to become the exclusive owner of. The complainant asserts that an important part of the property that was the subject of the non-litigious civil proceedings at issue performs a completely private legal function and, therefore, the complainant should allegedly enjoy the protection of Article 33 of the Constitution regarding such property.

3. By Order No. Up-699/12, dated 2 October 2012, the Constitutional Court accepted the constitutional complaint for consideration. It held that until the final decision of the Constitutional Court the UMK may not alienate or encumber the real properties on the complainant's territory specifically determined in the operative provisions of the Constitutional Court Order, regarding which it clearly follows from the Land Register that the UMK is their sole owner or the owner of a certain part thereof. In accordance with the first paragraph of Article 56 of the Constitutional Court Act (Official Gazette RS, Nos. 64/07 – official consolidated text, and 109/12 – hereinafter referred to as the CCA), the Constitutional Court informed the Higher Court in Koper of such. In accordance with the second paragraph of the same Article of the CCA, the Constitutional Court sent the constitutional complaint to the opposing party, who replied to the constitutional complaint. The opposing party primarily proposes the rejection of the constitutional complaint. Allegedly, the procedural prerequisites for its consideration are not fulfilled, since the Council of the Ankaran Local Community (hereinafter referred to as the Ankaran LC Council) or its president cannot validly authorise an attorney to lodge a constitutional complaint in the complainant's name, as the complainant cannot be a party to proceedings before the Constitutional Court and since the abrogation of only the challenged Higher Court order cannot change [the complainant's] legal position. In addition, the opposing party alleges that the constitutional complaint is unfounded on the merits. It asserts that it is not clear in what regard the complainant believes there to be an inequality before the law, that the complainant does not explicitly explain how it was curtailed in the exercise of the right to be heard, that the court of first instance already explained why the complainant did not have the right to judicial protection in the case at issue, and that the Higher Court did not adopt any standpoint whose content was contrary to the right to private property. The opposing party objects to the prohibition of the alienation or encumbrance of the real property.

4. The opposing party's reply was served on the complainant, who replied thereto. The complainant is of the opinion that it has the right to a Constitutional Court decision on the merits on a question that is *inter alia* opened by its constitutional complaint (namely the question of whether the fact that the Higher Court denied the complainant the capacity to be a party to proceedings is in accordance with human rights). Therefore, it is allegedly not admissible to reject the constitutional complaint due to the lack of such capacity. The complainant further alleges that the standpoints on the basis of which the court of first instance rejected its petition are legally irrelevant up until the moment when the court of second instance provides a standpoint on them (in the renewed adjudication of the appeal). Therefore, it is allegedly not obligated to challenge the order of the court of first instance with the constitutional complaint as well. The complainant furthermore does not agree with the opposing party's reservations whether the constitutional complaint is justified on the merits and also alleges that the opposing party filed an inadmissible “appeal” against the Constitutional Court Order on the acceptance of the constitutional complaint for consideration.

B. – I.

5. The opposing party is of the opinion that the constitutional complaint should be rejected, as the complainant cannot be a party to proceedings before the Constitutional Court and such deficiency cannot be remedied (the first paragraph of Article 6 CCA in conjunction with the fifth paragraph of Article 81 CPA), in addition, however, there also exist the conditions under indents two and six of the first paragraph of Article 55b of the CCA.

6. The opposing party's reproach that the complainant is not capable of being a party to proceedings deciding on this constitutional complaint is not justified. The complainant was established by Constitutional Court Decision No. U-I-114/11 and its constitution is a certain future fact. As a result, the Constitutional Court recognises its capacity to be a party to proceedings in the case at issue.

7. The Constitutional Court also rejects the opposing party's allegation that the Council of the Ankaran Local Community (hereinafter referred to as the Ankaran LC) cannot validly represent the complainant in the case at hand and that it cannot validly authorise an attorney to file a constitutional complaint in the complainant's name. Article 140 of the Statutes of the Urban Municipality of Koper (Official Gazette, Nos. 40/2000, 30/01, and 29/03, and Official Gazette RS, Nos. 90/05, 67/06, and 39/08 – hereinafter referred to as the Statutes) determines which local communities are established on the territory of the UMK. Among these is also the Ankaran LC, which encompasses the settlement of Ankaran, as is also confirmed by Article 2 of the Decree Establishing the Territories of the Local Communities in the Urban Municipality of Koper (Official Gazette, No. 12/96). The local communities of the UMK are legal entities governed by public law that are represented by the local community council (Article 141 of the Statutes);[1] the latter is the highest decision-making authority in all matters in the framework of the rights and obligations of a local community (Article 146 of the Statutes). In accordance with Article 147 of the Statutes, the members of the councils of the local communities of the UMK (thus, also

the Ankaran LC) are elected by voters with permanent residence in the local community. The territory of the Ankaran LC equals the territory of the Ankaran settlement and is thus the same as the complainant's territory – this territory seceded from the territory of the UMK (item 1 of the operational provisions of Constitutional Court Decision No. U-I-114/11). There is no doubt that the LSGA proceeds from the concept of the local community as a narrower part of the territory of a municipality (the first paragraph of Article 18 LSGA) or the concept of the local community as a form of subsequent division of a municipality, which is the basic unit of local self-government. The local community envisaged by the law is only a part of a larger whole and performs tasks which are mainly related to its inhabitants and the performance of which is delegated to it by the statutes of the municipality or a more detailed decree (Article 19b of the LSGA). The local community council may (unless such refers to the execution of powers which were already validly delegated to the local community) only propose decisions regarding the local community to the municipal council and, if such is stipulated in the statutes of the municipality, provide the municipal council with appropriate opinions (the second paragraph of Article 19a of the LSGA). The inhabitants of a local community thus as a rule exercise their right to local self-government in the municipality and in its local community as the narrower part of the municipality, whereby the (potential) tasks that are carried out independently by the local community are delegated to it from a higher level, depending on the will of the municipality.

8. The LSGA does not proceed from the possibility of systemic conflict between a municipality and a local community, but assumes that these two different hierarchical levels of exercise of local self-government cooperate and function harmoniously. In other words, the statutory regulation of self-government does not explicitly resolve a situation such as the one in the case at issue, where the Ankaran LC Council is the focal point and core of the democratically expressed will of the residents of Ankaran that their settlement secede from the UMK and that a new municipality be established – the will that was successfully implemented on the basis of Constitutional Court Decision No. U-I-114/11, by which the Constitutional Court established the Ankaran Municipality on the territory that equals the territory of the Ankaran LC. As regards the case at issue, the part of the cited Constitutional Court Decision that refers to the fact that the residents of Ankaran are to exercise their right to local self-government within the UMK until the regular local elections in 2014, may not be interpreted in the manner suggested by the opposing party (i.e. that the representative body of the “residents of Ankaran” is at present the mayor of the UMK). The Constitutional Court is namely confronted with a constitutional complaint by which the rejection of the complainant's application in non-litigious civil proceedings is being challenged, while in a broader sense it entails the resolution of a conflict between the complainant and the UMK regarding the exercise of ownership entitlements regarding a large number of municipal real properties. The authorities of the UMK, who *inter alia* from the outset consistently opposed the establishment of the complainant as an individual municipality, could by no means diligently and adequately represent and protect the complainant's interests in the case at issue, i.e. they would find themselves in an insoluble conflict of interest. As the complainant alleges, the Ankaran LC Council is the only directly elected authority of local self-government (solely) for the territory of the settlement of Ankaran, which is equal to the complainant's territory, and it was elected (solely) by an electorate which is equal to the complainant's electorate. In proceedings that eventually led to the establishment of the Ankaran Municipality, i.e. the complainant (Constitutional Court Decision No. U-I-137/10, dated 26 November 2010, Official Gazette RS, No. 99/10, and Constitutional Court Decision No. U-I-

114/11), the Constitutional Court recognised that it was precisely the Ankaran LC that had legal interest to lodge the petitions. In a formal sense, the Ankaran LC, represented by its Council, is by no means an authority of the complainant, as the complainant will not have any constituted authorities in accordance with the LSGA before the year 2014 (although exactly the same may be argued regarding the authorities of the UMK – they too are not the complainant's authorities). However, given the identity of the complainant's territory and the territory of the Ankaran LC, the territory from which its democratic legitimacy ensues, and the history of the development of the Ankaran Municipality, the Ankaran LC Council is without a doubt the body that is closest to the Ankaran Municipality as an individual basic unit of local self-government separate from the UMK, and is also the most appropriate [body] to represent the complainant's rights and legal benefits when and to the extent to which they are or could be in conflict with the interests of the UMK. In light of the above, the Constitutional Court – for this specific case – recognises the Ankaran LC Council's right in these constitutional complaint proceedings to represent the complainant or to authorise an attorney for its representation.

9. The opposing party's reservations regarding the complainant's legal interest are also unfounded. It is true that the complainant challenges only the Higher Court order that confirmed the Local Court order dismissing its application for the determination of relations and its application for an interim injunction. However, the possible success of such a constitutional complaint entails an evident legal benefit for the complainant: if the challenged second instance court order is abrogated, the decision to reject its application will no longer be final and the Higher Court will have to consider the complainant's appeal against the Local Court order anew, whereby – regardless of what decision it adopts – it will not be allowed to rely once again on standpoints from the challenged order that the Constitutional Court might asses as unconstitutional.

B. – II.

10. The Higher court based the challenged order on the standpoint that the complainant has no legal capacity and consequently is not capable of being a party to judicial proceedings. The Constitutional Court adopted a different standpoint for these constitutional complaint proceedings.[2] According to the assessment of the Constitutional Court, such entails an interpretation of statutory law which it cannot review in constitutional complaint proceedings, therefore, in this Decision it focused on the question of whether the rejection of the complainant's application to determine the relations between the joint owners and the application for an interim injunction for the reasons provided by the Higher Court was constitutionally justified, even if the thesis of the Higher Court on the nonexistence of the complainant as an entity under law is taken into account.

11. The complainant asserts that the challenged Higher Court order denies it access to the courts so that it may not protect its ownership rights to municipal real properties. In light of such assertions, the Constitutional Court must examine whether the challenged order is based on standpoints that are unacceptable with regard to the right to judicial protection.

12. The right to judicial protection determined by the first paragraph of Article 23 of the Constitution entails the right of everyone to have any decision regarding their rights, duties and any charges brought against them made without undue delay by an

independent, impartial court constituted by law. The mentioned right ensures the possibility to present a case to a court that will decide the case in substance (on its merits) in due time. It thus entails the guarantee of a decision on rights and duties, or a decision on whether, in accordance with substantive law, the charges are substantiated or not.[3] In addition, judicial protection must be effective. The purpose of the provision of the first paragraph of Article 23 of the Constitution is namely not only to guarantee everyone the right to judicial protection, but primarily to ensure that judicial protection is effective, i.e. that affected persons may effectively protect their rights, interests, and legal benefits.[4] It is of essential importance for the human right to judicial protection that there arise no acts that would nullify possible later success in proceedings by rendering impossible or excessively difficult the restitution of conditions as they were before the interference with the claimant's legal position.[5] As the complainant also challenges the rejection of the application for an interim injunction, it is necessary to emphasise the close connection between this procedural institution and the constitutional safeguard determined by the first paragraph of Article 23 of the Constitution, according to which the legal order must ensure instruments that prevent actions during court proceedings that would cause judicial protection to no longer fulfil its purpose. The statutory provisions regulating the admissibility of interim injunctions are in direct service to the constitutional requirement to ensure the effectiveness of the right to judicial protection.[6]

13. The case at issue entails the review of a court decision rejecting an application in non-litigious civil proceedings – due to the requirement of a judicial decision on the merits, court decisions rejecting [applications] are constitutionally important from the viewpoint of Article 23 of the Constitution, even though such does not entail that the Constitutional Court must review orders rejecting applications for judicial protection (legal actions, motions, etc.) from the viewpoint of legality in the sense of a review by a judicial instance.[7] What has to be reviewed is only whether the court interpreted procedural law in such a restrictive and limiting manner that may not even have been determined by a law. Such also applies to the interpretation of statutory provisions on positive or negative procedural prerequisites whose absence in a concrete case may cause there to be no decision on the merits regarding the rights and obligations at issue. With regard to procedural prerequisites, on the one hand, the legislature's activity when regulating civil procedure is already not unlimited (although not every statutory determination of a procedural prerequisite already entails a restriction of the right to judicial protection, as it may merely entail the determination of the manner of exercising the right to judicial protection in accordance with the second paragraph of Article 15 of the Constitution),[8] while, on the other hand, in concrete proceedings the courts must interpret them in a manner which does not endanger the essence of the human right determined by the first paragraph of Article 23 of the Constitution, which follows already from existing Constitutional Court case law.[9]

14. The capacity to be a party to proceedings is regulated by Article 76 of the CPA, which stipulates that any natural person or legal entity may be a party to proceedings, in exceptional cases, however, a court may recognise the characteristic of being a party with legal effect only for a specific legal action also to such forms of association that are neither natural persons nor legal entities [10] if these forms of association fulfil in essence the principal conditions for obtaining the capacity to be a party to proceedings, in particular if they possess property that may be subject to execution. The capacity to be a party to proceedings is closely connected to legal capacity under substantive law.[11] It indicates whether a person is the holder of procedural rights and duties. It basically entails the question of who may act as either plaintiff or

defendant in a legal action.[12] The capacity to be a party to proceedings is undoubtedly a procedural prerequisite that parties to civil proceedings have to fulfil in order for the proceedings to be conducted at all. Throughout the proceedings the court must *ex officio* ensure that a person acting as a party to civil proceedings has the capacity to be such (Article 80 CPA); If the court finds that this is not the case, it imposes on the plaintiff the requirement to remedy such deficiency within a certain period of time,[13] or (if the deficiency cannot be remedied or the provided time period expires) it rejects the legal action (Article 81 of the CPA). All of these provisions apply *mutatis mutandis* in non-litigious civil proceedings (Article 37 of the Non-litigious Civil Procedure Act, Official Gazette SRS, No. 30/86, and 20/88 – corr. – NCPA). Legal science mentions some essential circumstances relevant to recognition of the capacity to be a party to proceedings with effect in an individual case: it is easier to acknowledge the capacity to be a party to proceedings on the active side;[14] in addition to separate property owned by the formation in question, the court may also rely on other circumstances, such as the clear demarcation of the personhood of a certain form of association, its relative durability, established rules on representation, etc.[15]

15. By the challenged order the Higher Court accepted the standpoint that the complainant had not yet obtained legal capacity and the capacity to be a party to proceedings, nevertheless, it will obtain both after its constitution following the regular local elections in 2014. Such standpoint entails a certain postponement of the judicial protection of the complainant's rights and obligations under substantive law. Furthermore, it even entails a postponement of their arising as such. As it follows from the challenged order that the complainant is not yet an entity under law, the standpoint of the Higher court namely also entails that the complainant cannot yet have any rights or obligations under substantive law, including ownership rights (together with the UMK) regarding the undivided joint real properties situated (also) in the complainant's territory which seceded from the territory of the UMK (the first and third paragraphs of Article 51b of the LSGA).

16. In paragraph 10 of the reasoning of this Decision, the Constitutional Court explained that it is not assessing the correctness of the Higher Court's standpoints described in the previous paragraph. However, the question whether it is in accordance with the human right to judicial protection that the challenged order did not recognise the complainant the position of a party to the specific proceedings, as it allegedly had not yet become a legal entity, is decisive for the decision in the case at issue. The third paragraph of Article 76 of the CPA namely enables such recognition for forms of association that are not (yet) legal entities. As any other statutory provision, it must be interpreted as far as possible in accordance with the human rights determined by the Constitution. The Higher Court evidently did not take into account all of the consequences of the rejection of the complainant's application to regulate the relations between the joint owners and the application for an interim injunction. Even if we assume that the complainant is not yet an entity under law, following the adoption of Constitutional Court Decision No. U-I-114/11, the establishment of its legal personality is practically guaranteed and merely postponed until the time of its constitution and the commencement of exercising its tasks beginning from the first day of the fiscal year following the year when elections are held, in the case at issue, namely until 1 January 2015 (the fourth paragraph of Article 15b LSGA). At that moment the complainant will obtain the entitlements of being a joint owner of the municipal property on its own territory as well as on the territory of the UMK (the third paragraph of Article 51b of LSGA). At that moment the

complainant will be able to commence discussions with the UMK on a consensual division of the joint property (the first paragraph of Article 51b LSGA). Already today the complainant may expect that, should no agreement thereon be reached with the UMK, it will *ex lege* become the exclusive owner of a great majority[16] of the municipal real properties, the built public assets, and the public infrastructure on its territory, along with movable properties intended to serve the use of these real properties or the performance of activities for which these real properties are intended (indents one and three of the first paragraph of Article 51c of the LSGA) – that is, with retroactive effect from the day of its establishment, whereby the *ex lege* division of the joint property will only take place if the municipalities do not divide their properties by mutual agreement within the statutory time period.[17] The complainant is clearly going to be aggrieved if within the period of time until an agreement is concluded or the statutory rules on the division of joint property take effect the UMK alienates certain municipal real properties in the Ankaran municipality or encumbers them for the benefit of third parties (from the Higher Court's thesis, it logically follows that the UMK is in any event the exclusive owner of these real properties until 1 January 2015 and thus entitled to dispose of them). If before the division of the municipal property between the municipalities the municipal property of the UMK that is currently in the form of real property on the complainant's territory were converted into a different type of property (e.g. bank deposits containing the proceeds obtained from the sale of real property), such would have serious material consequences for the complainant even in the (uncertain)[18] case that the value of the property available for division remained the same.[19] The complainant's possibility to reimburse the amount of the resulting material damage by means of civil action against the UMK in court is, even if we disregard the issue of the UMK's liquidity, uncertain.[20] Therefore, in order to protect the complainant's rights and legal interests, particularly its future ownership rights regarding municipal real properties on its territory, it is of crucial importance that it has already at this moment at least access to appropriate substantive judicial protection in accordance with the first paragraph of Article 23 of the Constitution (regardless of whether its claims and applications are well- or ill-founded), by means of which it may attempt to prevent that it incurs material damage. Judicial protection that is (in accordance with the Higher Court's standpoint) in fact postponed until the establishment of the claimant's full legal capacity clearly cannot prevent interferences with the complainant's legal position that would very likely nullify the purpose of subsequent judicial protection even if the complainant's standpoints were justified on the merits.

17. In the non-litigious civil proceedings the complainant extensively argued and presented evidence that the UMK intends to sell a number of real properties on the complainant's territory. The Higher court did not take a position on these assertions and evidently did not consider them to be legally relevant. The Higher court did not apply the third paragraph of Article 76 of the CPA and did not recognise the complainant the capacity to be a party to the non-litigious civil proceedings at issue, although it fulfilled the conditions for such recognition. The complainant may expect that in the near future it will obtain a significant body of (primarily real) property, and as a municipality it is a territorial entity under public law and hence of a permanent nature, its legal personality (while being a future fact) is easily and clearly distinguishable from other entities under law, and in accordance with the appropriate interpretative approach there are no significant difficulties in determining the persons entitled to represent it.[21] If the Higher Court allowed the complainant to act as petitioner in the non-litigious civil proceedings, the complainant – provided the other conditions were met – could have expected a decision on the merits on whether as

the future joint owner it may prevent the arbitrary dispositions by the UMK of certain real properties and whether it is admissible to grant an interim injunction for such purpose. In other words, the recognition of the capacity to be a party to proceedings could have effectively protected the complainant's constitutional right to judicial protection or to a decision on the merits on rights or legal interests. As in the challenged order the Higher Court did not act in such manner and denied the complainant judicial protection, it interfered with the core essence of the complainant's right determined in the first paragraph of Article 23 of the Constitution, with which its decision is inconsistent.

18. In light of the established violation of the right to judicial protection, the Constitutional Court abrogated the challenged decision and remanded the case to the Higher Court in Koper for new adjudication. In the new proceedings the court will have to recognise the complainant the characteristic of being a party to the proceedings.

19. As the Constitutional Court has already abrogated the challenged order as a result of a violation of the human right to judicial protection determined by the first paragraph of Article 23 of the Constitution, it was not necessary to review the other alleged violations. With the issuance of this Decision, which *inter alia* requires the Higher Court to decide anew on the complainant's appeal against the rejection of its application for an interim injunction, the prohibition on the alienation and encumbrance of the real properties determined in Constitutional Court Order No. Up-699/12, dated 2 October 2012, which was to apply "until the final decision of the Constitutional Court" ceased to be valid and therefore the competent Local Court is to delete the appropriate entry in the Land Register.

C.

20. The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 59 of the CCA, composed of: President Dr. Ernest Petrič and Judges Dr. Mitja Deisinger, Dr. Dunja Jadek Pensa, Mag. Marta Klampfer, Dr. Etelka Korpič – Horvat, Mag. Miroslav Mozetič, Jasna Pogačar, Dr. Jadranka Sovdat, and Jan Zobec. The Decision was adopted by five votes against four. Judges Klampfer, Sovdat, Mozetič, and Petrič voted against. Judge Sovdat submitted a dissenting opinion.

Dr. Ernest Petrič
President

Endnotes:
[1] Such regulation is in accordance with the first and the third paragraphs of Article 19c of the LSGA.
[2] See paragraph 6 of the reasoning of this Decision.
[3] Compare with A. Galič, Ustavno civilno procesno pravo, GV Založba, Ljubljana 2004, p. 129.

[4] Constitutional Court Decision Nos. U-I- 45/07, Up-249/06, dated 17 May 2007 (Official Gazette RS, No. 46/07, and OdlUS XVI, 28).
[5] Constitutional Court Decision Nos. U-I-196/09, Up-947/09, dated 11 February 2010 (Official Gazette RS, No. 17/10).
[6] Compare with Constitutional Court Decision No. Up-275/97, dated 16 July 1998 (OdlUS VII, 231). The European Court of Human Rights (hereinafter referred to as the ECtHR) also protects the so-called right to effective access to courts within the framework of the right to a fair trial determined by the first paragraph of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR). In the *The Canea Catholic Church v. Greece* Judgment, dated 16 December 1997, the ECtHR stressed that Greece violated the essence of the right of access to court of a religious community, as the Greek courts did not recognise its legal capacity and thus its capacity to be a party to civil proceedings only due to the fact that the religious community did not formally register itself as one of the possible types of legal entities according to Greek law, although in previous longstanding case law its legal capacity had never been questioned. By acting in such manner, the court restricted the relevant church in a manner that, in the case at issue, as well as in the future, prevented it from obtaining a court decision on the merits in any kind of dispute regarding its property rights.
[7] Compare with Constitutional Court Decision No. Up-85/03, dated 17 December 2003 (Official Gazette RS, No. 133/03, and OdlUS XII, 115).
[8] Constitutional Court Decision Nos. U-I-277/09, Up-1333/09, U-I-287/09, Up-1375/09, dated 14 June 2011 (Official Gazette RS, No. 58/11).
[9] In Decision No. Up-341/99, dated 4 October 2001 (Official Gazette RS, No. 85/01, and OdlUS X, 227), the Constitutional Court stressed that the right to judicial protection as a right to a decision on the merits is not unlimited and that the law may determine procedural prerequisites, i.e. circumstances that have to be (or that must not be) fulfilled in order for the court to adopt a decision on the merits in a dispute; the court may, however, not deprive a party of the right to judicial protection in an inadmissible manner by applying an excessively narrow or erroneous interpretation of procedural restrictions.
[10] Or they are not accorded the capacity to be a party to proceedings by some other special regulation.
[11] L. Ude, Civilno procesno pravo, Uradni list RS, Ljubljana 2002, p. 166.
[12] A. Galič in: L. Ude and A. Galič (eds.), Pravdni postopek, zakon s komentarjem, Vol. 1, Uradni list RS and GV založba, Ljubljana 2005, p. 316.
[13] By making the necessary corrections to the legal action or undertaking other actions to enable the continuation of proceedings with a person who may act as a party to proceedings.
[14] As the plaintiff is under the threat of execution at most for the costs of the proceedings, the condition of existing property is less stringent for him than in the case when a court decides whether to recognise the capacity to be a party to proceedings to a defendant. In addition, there are more likely going to be complications with execution if a defendant who is not a legal entity is sentenced to perform certain actions.
[15] Compare with A. Galič, op. cit., pp. 319–320.
[16] The great majority because it is in fact possible that the UMK will obtain exclusive ownership rights to some real properties in the Ankaran municipality, but only regarding such (potential) properties which in their entirety serve the performance of the mandatory public utility services of the UMK.

[17] Such a retroactive effect cannot be the basis for an interference with the rights of third parties who would obtain rights to the property at issue in the meantime. It may, however, be a hypothetical basis for different civil law claims between the municipalities (see also endnote No. 20).
[18] The UMK could even finance its current needs through the sale of real properties in Ankaran.
[19] Other property rights, funds, and securities […] are divided in proportion to the number of residents on the territory of the individual new municipalities or the seceded part of the municipal territory and the number of residents of the former municipality (the fourth paragraph of Article 51c of the LSGA).
[20] If the courts accepted the standpoint that until the complainant's constitution the UMK was the exclusive owner of the municipal property it had sold, as up to now the complainant has not existed as an entity under law, it is questionable whether the complainant's claims for damages or the repayment of enrichment would be successful. The complainant would have to demonstrate that in the legal order there exists a sort of duty of loyalty, i.e. of attending to the interests of an already existing municipality in relation to a future municipality (a municipality in the process of constitution) that must also be observed when managing property which is likely to become the property of the future municipality provided it is not sold before such is “completely” constituted.
[21] See paragraphs 7 and 8 of the reasoning of this Decision.