

16.10.2005, E.2001/383, K.2003/92

Date : 16.10.2005
Number : E.2001/383, K.2003/92
Official Gazette : 19.01.2006, 26054
Subject : The civil service, Exercise of public functions by private bodies, Expropriation, Technology development zone, administration.

Headnotes:

Basic functions of a permanent nature required by public services must be carried out by the state, state economic enterprises and other public corporate bodies. The competence to grant licences and permission in Technology Development Zones may not be delegated to private companies, but only to the state, state economic enterprises or other public corporate bodies.

The power to expropriate can only be exercised by the State and public corporations where this is necessary in the public interest. This power may not be given to private corporations. Public bodies can, however, expropriate in favour of private real or legal personalities where this is necessary.

Summary:

The President of the Republic sought a ruling from the Constitutional Court as to whether certain provisions of Technology Development Zones Law no. 4691 were contrary to the Constitution.

a. The third sentence of Article 4.3 of Law no. 4691

Under the third sentence of Article 4.3 of Law no. 4691, licences and permissions related to the use of land and the planning, construction and usage of buildings and establishments in the technology development zones shall be given to "the administrative company" and they shall be controlled by them.

The President of the Republic suggested that the granting of licences and permissions for the construction and usage of buildings is a basic public service of a permanent nature and as such must be performed in accordance with the principles of general administration. However, the above provision gives these powers to private foreign companies. Arguably, therefore, the provision is at odds with the principles set out in Article 128 of the Constitution.

All activities relating to the sub-structure of the land and all local and regional plans concerning investment have a bearing on the way land is to be used. As a precondition for licences and permissions, planning procedures must be carried out in accordance with laws, regulations and zoning plans. Such plans for the usage of the land and the buildings and establishments which will be set up there have to be prepared by the owners and submitted to the relevant authority. The granting of licences and permissions for the construction and the usage of buildings and establishments is one of the controls and responsibilities forming part of the construction process.

In its decision of 11 December 1986, the Constitutional Court had ruled that the duty and competence of granting licences for the construction and the usage of buildings are administrative functions. Control over this issue is a basic function of the public services, of a permanent nature. As such, it must be performed in accordance with the principles of general administration. Under Article 128 of the Constitution, the above functions must be carried out by public servants and other public employees.

The third sentence of Article 4.3 of the Law no. 4691, on the other hand, envisages that the above permissions may be given by "administrative companies". The same piece of legislation defines "administrative company" as any private joint stock company. Such a company will employ its staff under labour law principles. Since the personnel employed by a private company cannot be regarded as public servants or public employees, this would mean that private sector staff would be granting licences and permissions, which of course contravenes Article 128 of the Constitution. The above provision was found unconstitutional and repealed. Justice Mr H. Kilic put forward a dissenting opinion as to this part of the judgment.

b. First sentence of Article 5.5 of the Law no. 4691

The first sentence of Article 5.5 of the Law no. 4691 provided that "administrative companies may expropriate or have real estate expropriated on its behalf if this is to the public benefit."

The President of the Republic suggested that expropriation is, in essence, a kind of competence afforded to the State and public bodies. Expropriation may be made by the State or public bodies in favour of private legal personalities where this would be in the public interest.

Under Article 46 of the Constitution, the State and public corporations are entitled to expropriate privately-owned real estate wholly or in part and impose conditions on its use in accordance with principles and procedures prescribed by law, provided that compensation is paid in advance, where this is in the public interest.

Expropriation is the termination of private ownership of real estate without the will of the owner to satisfy the needs of society as a whole. Thus, the subject of expropriation is privately owned real estate and only the State or public corporations have the competence to expropriate it.

The above provision gave private legal entities the power to expropriate real estate contrary to Article 46 of the Constitution. Since expropriation requires the use of public power, it may not be regarded as a competence which private companies can exercise. Nevertheless, public corporate bodies may expropriate real estate in favour of real or legal private personalities if this is in the public interest.

The provision was found to be contrary to Article 46 of the Constitution and it was repealed. Justice S. Akbulut put forward a dissenting opinion.