

1965
Oct. 18,
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MIKIS
MARATHEFTIS
and
THE REPUBLIC
THROUGH THE
PUBLIC SERVICE
COMMISSION

[TRIANTAFYLLIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

MIKIS MARATHEFTIS,

Applicant,

and

THE REPUBLIC THROUGH THE
PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 156/64).

Administrative Law—Public Officers—Promotions—Recourse against promotion, on secondment, to the post of Senior Supervisor of Accounts, Treasury Department—Relevant decision of the Respondent Body annulled due to the participation therein of two members thereof, who were disqualified from doing so, because of close relationship with the person promoted (Interested Party)—Validity of promotion could not be saved on the ground that the said two disqualified members of the Commission had to participate in order to preserve a quorum, which did not exist in the first place, at the material time.

Constitutional Law—Constitution of Cyprus, Article 125.3, and proviso to sub-paragraph (4) thereof—Public Service Commission—Quorum—Provision that all decisions of the Public Service Commission should be taken by an absolute majority vote of its members—Effect of proviso to sub-paragraph (4) (supra) — Proceedings for selection for promotion on secondment—Question of whether or not the Commission, in the anomalous circumstances prevailing at the material time in Cyprus could have functioned without a quorum, on the basis of the law of necessity, left open.

Administrative Law—Constitution of Cyprus, Article 146—Promotion on secondment, treated, in the particular circumstances of the present case, as a final decision which can be the subject of a recourse under Article 146

Applicant seeks the annulment of the promotion, on secondment, to the post of Senior Supervisor of Accounts, of a certain Mr. *George Hartsiotis*. One of the main points which has been raised on behalf of Applicant in these pro-

ceedings, is that the relevant decision of the Commission, for the secondment of the Interested Party, is void due to the participation therein of two members of the Commission who were disqualified, due to close relationship with the said Interested Party, from so doing.

At the hearing of this Case it was agreed between counsel that this point of the participation of allegedly disqualified members of the Commission should be determined first, before the hearing of the Case would proceed further.

Held, I. The question of the effect of the participation of a disqualified member of a collective body has been dealt with by this Court in the case of *Kallouris and The Republic*, 1964 C.L.R. p. 313 and the relevant principle, as expounded therein, does not have to be repeated. Only, particular attention is drawn to the basis of such principle, as it is to be found set out at p. 317 of the report of the *Kallouris* case.

(i) The degree of relationship between the Interested Party and Mr. Theocharides and Mr. Lapas, — Mr. Theocharides in particular—is so close by present-day realities, of which I take judicial notice, that, in accordance with the principles expounded in the *Kallouris* case, the participation of the said two members in the decision to promote on secondment the Interested Party defeats the appearance of an independent judgment of the Commission and, also, shakes the confidence in its impartiality even though, of course, there is no ground for believing that either Mr. Theocharides or Mr. Lapas have in fact favoured improperly the Interested Party. The fact remains that through their participation the composition of the Commission, for the particular purpose, has been rendered defective in law, with the result that its relevant decision is invalidated.

Kallouris and The Republic, 1964 C.L.R. 313 followed.

(ii) It is a well-known exception to the principle expounded in the case of *Kallouris*—and it is actually referred to therein, vide p. 322—that a member need not be treated as disqualified if the remaining members cannot constitute a quorum.

(iii) When, even with the participation of a disqualified member, no proper quorum can be formed, then such

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member is not entitled to participate in the proceedings of a collective organ on the ground of the above exception, because in such a case such organ is not worse off, through his absence, as regards quorum.

(iv) The validity of the appointment of the Interested Party cannot be saved on the ground that the two disqualified members of the Commission had to participate in order to preserve a quorum, which did not exist in the first place, at the material time.

(v) I leave entirely open the question of whether or not the Commission, in the anomalous circumstances prevailing at the material time in Cyprus, of which I do take judicial notice, could have nevertheless functioned without a quorum, on the basis of the law of necessity.

(vi) The effect of the proviso to paragraph (4) of Article 125(3) of the Constitution, is, merely, that the Commission, when meeting with a proper quorum, is bound to act on the unanimous recommendation provided for therein. It does not prescribe a minimum number of votes necessary for the purpose of the selection of the candidate to be appointed nor—as already stated—a special quorum.

(vii) Moreover, such proviso can only come into play when the Commission is meeting with a proper quorum, enabling it to take a decision by an absolute majority vote; and the same applies, also, to the provisions regarding special majorities, to be found in sub-paragraph (3) of Article 125(3). If it were to be found — and I have left it open—that the Commission, by the law of necessity, was entitled at the material time to act without its proper quorum, then necessarily and *a fortiori*, provisions such as those of sub-paragraphs (3) and (4) of Article 125(3) would not come into the picture.

(viii) The two disqualified members of the Commission were not bound to participate in the taking of the decision to promote on secondment Mr. Hartsiotis, to the post of Senior Supervisor of Accounts, and that, because of the participation of such members, the sub judice decision of the Commission is bound to be declared *null* and *void*; there shall be an order of this Court accordingly.

II. As regards costs:

I have decided to award only part of the costs in favour of Applicant, viz. £15.-.

Sub judice decision declared null and void.

Cases referred to:

Kallouris and The Republic, 1964 C.L.R. p. 313;

Ozturk and The Republic, 2 R.S.C.C. p. 35.

Recourse.

Recourse against the decision of the Respondent to promote on secondment to the Post of Senior Supervisor of Accounts a certain Mr. George P. Hartsiotis in preference and instead of the applicant.

A. Anastassiades for the applicant.

M. Spanos, Counsel of the Republic, for the respondent.

Cur. adv. vult.

The facts of the Case sufficiently appear in the following judgment delivered by:—

TRIANTAFYLLIDES, J.: In this Case Applicant applies for the annulment of the promotion, on secondment, to the post of Senior Supervisor of Accounts, of a certain Mr. George Hartsiotis.

Such promotion, though made on secondment, should, in the circumstances of this Case, be treated as a final decision which can be the subject of a recourse, under Article 146, because, as it has been explained by counsel for Respondent, the said promotion has been made on secondment not because of the temporary nature or duration thereof, but because of the, for the time being, temporary nature of the post concerned; when such post becomes a permanent one, then Mr. Hartsiotis will be appointed to it, subject of course to satisfactory service in the meantime. It is abundantly clear that this is not a case of a temporary secondment, leaving open for future consideration the final selection of the person to be promoted eventually to the post in question,

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but a case where such selection has already been decided upon.

Both Applicant and Mr. Hartsiotis (to be referred to as "the Interested Party") were at the material time Supervisors of Accounts, enjoying equal seniority in such post, since April, 1956.

When vacancies in the promotion post of Senior Supervisor of Accounts came to be filled by the Public Service Commission, the Supervisors of Accounts, including Applicant and the Interested Party, were duly considered. As it appears from the relevant minutes of the Commission, of the 8th October, 1964, (*exhibit 1*) it was decided to appoint a certain Mr. M. Joannides to one such post and, also, to second the Interested Party, in the circumstances already explained in this judgment.

One of the main points, which has been raised on behalf of Applicant in these proceedings, is that the relevant decision of the Commission, for the secondment of the Interested Party, is void due to the participation therein of two members of the Commission who were disqualified, due to close relationship with the said Interested Party, from so doing.

Such members are Mr. Theocharides, the Chairman of the Commission, and Mr. Lapas, both of whom are related to the wife of the Interested Party; her mother is the sister of the Chairman of the Commission and also the sister of the wife of Mr. Lapas. In other words the Interested Party is the nephew by marriage of both Mr. Theocharides and Mr. Lapas.

At the hearing of this Case it was agreed between counsel that this point of the participation of allegedly disqualified members of the Commission should be determined first, before the hearing of the Case would proceed further. Having heard arguments thereon I have reserved my decision until today.

The question of the effect of the participation of a disqualified member of a collective body has been dealt with by this Court in the case of *Kallouris and The Republic*, 1964, C.L.R. 313 and the relevant principle, as expounded therein, does not have to be repeated. Only, particular attention is drawn to the basis of such principle, as it is to be found set out at p. 317 of the report of the *Kallouris* case.

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I am quite satisfied that the degree of relationship between the Interested Party and Mr. Theocharides and Mr. Lapas,—Mr. Theocharides in particular—is so close by present-day realities, of which I take judicial notice, that, in accordance with the principles expounded in the *Kallouris* case, the participation of the said two members in the decision to promote on secondment the Interested Party defeats the appearance of an independent judgment of the Commission and, also, shakes the confidence in its impartiality (vide *Kallouris, supra*, at p. 320)—even though, of course, there is no ground for believing that either Mr. Theocharides or Mr. Lapas have in fact favoured improperly the Interested Party. The fact remains that through their participation the composition of the Commission, for the particular purpose, has been rendered defective in law, with the result that its relevant decision is invalidated.

Counsel for Respondent has tried to avoid the, thus, inevitable annulment of the *sub judice* decision of the Commission by relying on the contention that had the said two affected members of the Commission not participated, in the relevant proceedings of the Commission, there would not have been formed the necessary quorum enabling the Commission to function.

It is a well-known exception to the principle expounded in the case of *Kallouris*—and it is actually referred to therein, vide p. 322—that a member need not be treated as disqualified if the remaining members cannot constitute a quorum. (Vide also Conclusions from the Jurisprudence of Greek Council of State 1929-1959, p. 112).

I am of the opinion, however, that when, even with the participation of a disqualified member, no proper quorum can be formed, then such member is not entitled to participate in the proceedings of a collective organ on the ground of the above exception, because in such a case such organ is not worse off, through his absence, as regards quorum.

The five members of the Commission who participated in reaching the decision to promote on secondment the Interested Party—and it is common ground that they were only five—did not, in any case, constitute a quorum of the Commission. The quorum of the Commission is not fixed expressly either by the Constitution or by any legislation. The general rule applicable to the question of quorum of a

collective organ viz. that, in the absence of specific provision, such quorum is half its members plus one, (vide Jurisprudence of Greek Council of State, *supra*, p. 109), governs, therefore, the matter of the quorum of the Commission. Actually in the case of the Commission this is, also, so by inescapable implication, because of the provision, to be found in Article 125(3) of the Constitution, that all decisions of the Commission shall be taken by an absolute majority vote of its members i.e. six.

So the validity of the appointment of the Interested Party cannot be saved on the ground that the two disqualified members of the Commission had to participate in order to preserve a quorum, which did not exist in the first place, at the material time.

I leave entirely open the question of whether or not the Commission, in the anomalous circumstances prevailing at the material time in Cyprus, of which I do take judicial notice, could have nevertheless functioned without a quorum, on the basis of the law of necessity.

Counsel for Respondent has referred me to sub-paragraph (4) of Article 125 (3), and particularly to the proviso thereto. The said sub-paragraph (4) reads as follows:—

“(4) When the question relates to the selection of the Greek or Turk to be appointed or promoted, the decision shall, subject to sub-paragraph (3) of this paragraph, be taken by an absolute majority vote:

Provided that the unanimous recommendation, of five Greek members in the case of the selection of a Greek shall be acted upon by the Commission”.

When, however, the proviso to sub-paragraph (4) is read together with the main part of such sub-paragraph, and in the context of the whole paragraph 3 of Article 125, (vide also *Ozturk and The Republic*, 2 R.S.C.C. p. 35) there can be no doubt that the said proviso does not specially prescribe the quorum of the Commission for the purpose of selecting the person to be appointed and, thus, no question of preserving such quorum, by means of the participation of the two disqualified members of the Commission, could have arisen in the present Case.

The effect of the proviso in question is, merely, that the

Commission, when meeting with a proper quorum, is bound to act on the unanimous recommendation provided for therein. It does not prescribe a minimum number of votes necessary for the purpose of the selection of the candidate to be appointed nor—as already stated—a special quorum.

Moreover, in my opinion, such proviso can only come into play when the Commission is meeting with a proper quorum, enabling it to take a decision by an absolute majority vote; and the same applies, in my opinion, also, to the provisions regarding special majorities, to be found in sub-paragraph (3) of Article 125(3). If it were to be found—and I have left it open—that the Commission, by the law of necessity, was entitled at the material time to act without its proper quorum, then, necessarily and *a fortiori*, provisions such as those of sub-paragraphs (3) and (4) of Article 125(3) would not come into the picture.

For all the reasons set out, above, in this judgment, I hold that the two disqualified members of the Commission were not bound to participate in the taking of the decision to promote on secondment Mr. Hartsiotis, to the post of Senior Supervisor of Accounts, and that, because of the participation of such members, the *sub judice* decision of the Commission is bound to be declared *null* and *void*; there shall be an order of this Court accordingly.

It is now up to the Commission to reconsider the matter of a promotion on secondment to the temporary post of Senior Supervisor of Accounts, without the participation in its proceedings of the Chairman and of Mr. Lapas so long as Mr. Hartsiotis is one of the candidates under consideration. Should the Commission decide, after a proper exercise of its discretion—and this Court is expressing no view whatsoever in this respect—to select for promotion Mr. Hartsiotis once again, then the observations of this Court in the *Kallouris* case (*supra*, at p. 324) are drawn to the attention of the Commission, in relation to the possible date of effect of such promotion.

In view of my decision on the question of disqualification of two members of the Commission no other issues in this Case need be considered or determined.

As regards costs I have noted that the promotion of Mr. Hartsiotis was decided upon before the judgment in the

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Kallouris case, *supra*, and it is quite possible that if the Commission had in mind the said judgment the two disqualified members might not have chosen to participate. So I have decided to award only part of the costs in favour of Applicant, viz. £15.-

Sub judice decision declared null and void. Order as to costs as aforesaid.