1980 June 21

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANDREAS AVGOUSTI,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE COUNCIL OF MINISTERS,

Respondent.

(*Case No.* 243/76).

Army of the Republic (Constitution, Enlistment and Discipline) Laws, 1961–1975—Dismissal of officer—Can take place only upon the opinion of a competent Military Disciplinary Board—Section 6 of the Law.

Statutes—Construction—Substitution of words—Possible only where there is a repugnancy or something in a statute opposed to good sense—No repugnancy or something opposed to good sense in section 6 of the Army of the Republic (Constitution, Enlistment and Discipline) Laws, 1961–1975 calling upon the Court to modify its language.

The sole issue for consideration in this recourse, which was directed against the decision of the respondents to terminate the services of the applicant as an officer of the Cyprus Army, was whether the respondents ought, by virtue of section 6 of the Army of the Republic (Constitution, Enlistment and Discipline) Laws, 1961–1975, to have before them the opinion of a competent Military Disciplinary Board before terminating the services of the applicant.

Section 6 of the above Laws reads as follows:

"6. The Council of Ministers, may upon the opinion of a competent Military Disciplinary Board, dismiss any officer or noncommissioned officer or soldier who was

found guilty of gross misconduct, disobedience or omission to perform his duties, or who in the opinion of the Council of Ministers is unsuitable to be a member of the Army, without payment to any such officer, noncommissioned officer or soldier of any compensation".

Counsel for the respondents invited the Court to interpret the above section in such a manner as to give effect to the real intention of the legislator and rectify a mistake of syntax to which the author of the section fell and which should be corrected by the Court.

Held, that the Courts are very reluctant to substitute words in a statute or to add words to it; that they will only do so where there is a repugnancy or something which is opposed to good sense; that there is no repugnancy or something which is opposed to good sense, calling upon this Court to modify the language of the section so as to meet what counsel suggests was the intention of the legislator which by a drafting mistake, was not achieved; that the opinion of the Board can reasonably be expected, both in the case where a member of the army is found guilty of some misconduct and also where, though not found guilty the Board is still of the opinion that he should still be dismissed and it is up to the Council of Ministers in either case to do so or not if in its opinion the person concerned is unsuitable to be a member of the army; and that, therefore, the *sub judice* decision must be annulled.

Sub judice decision annulled.

Cases referred to:

R. v. *Trafford* [1850] 15 Q.B. 200;

Fredericks v. *Payne* [1862] 1 H. &. C. 584.

Recourse.

Recourse against the decision of the respondent whereby his services as an officer of the Cyprus army were terminated.

L.N. Clerides with *M. Pierides*, for the applicant.

N. Charalambous, Counsel of the Republic, for the respondent.

Cur. adv. vult.

A. Loizou J. read the following judgment. The applicant by the present recourse seeks a declaration that the act and/or

decision of the respondents whereby his services, as an officer of the Cyprus army were terminated as from the 10th September, 1976, on the ground of unsuitability for the post and without offering him any compensation under the provisions of section 6 of the Army of the Republic (Constitution, Enlistment and Discipline) Laws, 1961–1975, and/or his dismissal from his aforesaid post is null and void and of no effect whatsoever.

The application is based on the following grounds of law:–

(a) The respondents acted contrary to the Army of the Republic (Constitution, Enlistment and Discipline) Laws of 1961 to 1975.

(b) The decision complained of is of a disciplinary nature and was reached without affording the applicant an opportunity to be heard in his defence, contrary to and in a way incompatible with the principles of natural justice.

(c) The act and/or decision complained of was not reasoned or duly reasoned under the circumstances.

(d) The respondents acted with bias and bad faith and/or under a misconception of both the facts and law.

The applicant was enlisted in the Cyprus Army on the 1st November, 1962 with the rank of Captain having served until then as a Captain in the Greek Army in the Military School of which he had received his training. On the 1st November, 1971, he was promoted to the rank of Major. On or about the 9th September, 1976, the applicant received a letter, *exhibit* "A", dated the 8th September, 1976, which reads as follows:–

"I have been instructed to inform you that the Council of Ministers at its meeting of the 2nd September, 1976, by its Decision No. 15.201, decided to terminate your services in the Cyprus Army as from the 10th September, 1976, without the payment of any compensation.

2. You are requested up to the aforesaid date to hand in to the Ministry of Defence all clothing and equipment in your possession which have been delivered to you during your service in the ranks of the Cyprus Army.

3. Copy of the Decision of the Council of Ministers is attached hereto for your information."

This decision reads as follows:-

"Extracts from the Minutes of the Council dated 2.9.1976 Termination of service of a member of the Cyprus Army. Submission No. 620/76. Decision No. 15.201. The Council studied the aforesaid subject and in the light of the oral explanations given at its meeting and after a meticulous examination of the facts adduced, which constituting State secrets that cannot be disclosed for reasons of security, decided that Andreas Avgousti, a Major of the Cyprus Army, is unsuitable to be a member of the Army and by virtue of section 6 of the Army of the Republic (Constitution, Enlistment and Discipline) Laws of 1961-1975, decided to dismiss him as from the 10th September, 1976, without payment of any compensation."

The Submission No. 620/76 to the Council of Ministers after referring to the date of appointment and promotion of the applicant, reads as follows:-

" .....

2. For reasons which will be expounded to the Council at the discussion of the submission, and which refer to acts and actions of the said Major which emanate from the elements in his personal file, he is considered unsuitable to be a member of the Army.

3. The Minister of Defence who will introduce the subject will suggest that the Council of Ministers dismisses the said Major for the sake of the general interest of the service under the provisions of section 6 of the Army of the Republic (Constitution, Enlistment and Discipline) Laws 1961-1973."

Upon a direction made under the provisions of rules 7 and 7A of the Supreme Constitutional Rules, the following particulars were filed in Court regarding grounds (A) and (B) of the recourse:

"*Ground A.*

(a) The decision of respondent No. 15201 dated the 2.9.1976 is contrary to s. 6 of Law No. 8/61 in that

the decision of the respondent was never preceded by a recommendation and/or an expressed opinion of the competent Disciplinary Military Tribunal as provided in the said section of the Law.

(b) The decision of the respondent to dismiss applicant from the ranks of the Cyprus Army taken on the 2.9.1976 with effect from the 10.9.1976 i.e. with only eight days notice contravenes s. 6 of Law 8/61 in that the notice given to applicant is not a reasonable notice.

Ground B.

(a) The decision taken was prompted by motives extraneous to the provisions of Law 8/61 and particularly s. 6 thereof because applicant was, has been and is an example of an efficient and good army officer.

(b) The respondent acted upon a misconception of fact in that the information before it, on the basis of which the subject-matter decision was taken, was not independent but biased emanating from sources which deprived them of the possibility of supplying to respondent a true, accurate and correct exposition of the facts relating to applicant.

(c) The respondent acted upon a misconception of law in that they misconstrued the powers vested in them under s. 6 of Law 8/61 by extending same to cases outside the letter and spirit of the section i.e. the suitability of the applicant as an officer of the Army."

Although originally an objection was raised to an application on behalf of the applicant for directions under rule 12(2) of the Supreme Constitutional Court Rules for the production of all necessary documents and for making available both the oral explanations and also the material placed before the Council of Ministers, eventually counsel for the respondent produced all relevant documents claiming no privilege whatsoever for anyone of them. The documents, produced were in fact the personal file of the applicant, (*exhibit* 1), in which there appears to be a bundle of documents which consist of a report of the Commander of the National Guard, General Komninos, sent to the office of the Minister of Interior and Defence, a report

of Major Ioannis Zambartas and three printed copies of the speech of Archbishop Makarios to the Security Council of the United Nations made on the 19th July, 1974.

In the report of the Commander of the National Guard it is stated that three questions were put to the applicant:

(a) If he distributed these leaflets to Officers of the National Guard and to whom.

(b) What was the purpose of such an action.

(c) Who supplied him with them.

On the first question he replied that he did not remember to whom he gave the leaflets but that he did not give to more than two. On the second question he gave no clear answer and on the third question, whereas at the beginning he mentioned that he did not remember from whom he was supplied the leaflets, later he mentioned that they were given to him by a Policeman, whose identity he did not mention, he was given four or five copies and that he had in his possession two or three, which he undertook to return to them.

In the report of Major Zambartas reference is made to advice given by him to the applicant to the effect that the latter should appear before the late President Makarios, express his repentance for what he had done against the Cyprus State and promise that thereafter he would be devoted to his Beatitude and to his service and that that would be in the interest of his further career because of the known forgiveness of the late President. The applicant replied that he would not do such a thing as he disagreed with the policy of the Archbishop.

The report contains also information as to the circumstances this Major came to know about the leaflet.

The concluding paragraph of the report of the Commander of the National Guard reads as follows:-

"As the aforementioned actions of Major Avgousti Andreas as well a those mentioned by Major Zambartas have clear political character and present the said Major as devoid of the substantial qualifications for a permanent Officer, namely 'of being loyal to the lawful authority', the present report is submitted for further action according to your judgment."

Before dealing with the grounds of Law argued on behalf of the applicant it is useful to quote section 6 of the Law. It reads:

"6. Τὸ 'Υπουργικὸν Συμβούλιον δύναται, κατόπιν γνωματεύσεως ἁρμοδίου Στρατιωτικοῦ Πειθαρχικοῦ Συμβουλίου, νὰ ἀπολύσῃ οἱονδήποτε ἀξιωματικὸν ἢ ὑπαξιωματικὸν ἢ ὁπλίτην ὅστις εὑρέθη ἔνοχος ἀνοικείου συμπεριφορᾶς, ἀνυπακοῆς ἢ παραλείψεως τῶν καθηκόντων του, ἢ ὅστις κατὰ τὴν γνώμην τοῦ 'Υπουργικοῦ Συμβουλίου εἶναι ἀκατάλληλος νὰ εἶναι μέλος τοῦ Στρατοῦ, ἄνευ πληρωμῆς πρὸς οἱονδήποτε τοιοῦτον ἀξιωματικόν, ὑπαξιωματικὸν ἢ ὁπλίτην, οἱασδήποτε ἀποζημιώσεως".

In English:

"6. The Council of Ministers, may upon the opinion of a competent Military Disciplinary Board, dismiss any officer or noncommissioned officer or soldier who was found guilty of gross misconduct, disobedience or omission to perform his duties, or who in the opinion of the Council of Ministers is unsuitable to be a member of the Army, without payment to any such officer, noncommissioned officer or soldier of any compensation."

Counsel for the applicant has argued that under the provisions of the aforesaid section 6, before an officer etc, is dismissed, for any of the reasons set out therein, the Council of Ministers must have before it the opinion of a competent Military Disciplinary Board, and as no such opinion was placed before the Council the *sub judice* decision should be annulled on that ground.

It is the case for the respondent that the opinion of such a Board is required only when the Council of Ministers dismisses a member of the army for "gross misconduct, disobedience, or omission to perform his duties" and not when in the opinion of the Council of Ministers such a member "is unsuitable to be a member of the army" as it was with the present case. In fact it was urged that this limb of the section constitutes an administrative major offence independent of the commission of a disciplinary offence by a member of the army.

I was invited to interpret this section in such a manner as to give effect to the real intention of the legislator and rectify a

mistake of syntax to which the author of the section fell and which should be corrected by the Court so as to read as follows:

"Τὸ Ὑπουργικὸν Συμβούλιον δύναται νὰ ἀπολύσῃ οἱονδήποτε ἀξιωματικὸν ἢ ὑπαξιωματικὸν ἢ ὁπλίτην ὅστις, κατόπιν γνωματεύσεως ἁρμοδίου Στρατιωτικοῦ Πειθαρχικοῦ Συμβουλίου, εὑρέθη ἔνοχος ἀνοικείου συμπεριφορᾶς, ἀνυπακοῆς ἢ παραλείψεως τῶν καθηκόντων του, ἢ ὅστις κατὰ τὴν γνώμην τοῦ Ὑπουργικοῦ Συμβουλίου εἶναι ἀκατάλληλος νὰ εἶναι μέλος τοῦ Στρατοῦ, ἄνευ πληρωμῆς πρὸς οἱονδήποτε τοιοῦτον ἀξιωματικόν, ὑπαξιωματικὸν ἢ ὁπλίτην, οἱασδήποτε ἀποζημιώσεως."

In English:

"The Council of Ministers may dismiss any officer or noncommissioned officer or soldier who, upon the opinion of a competent Military Board, was found guilty of gross misconduct, disobedience or omission to perform his duties, or who in the opinion of the Council of Ministers is unsuitable to be a member of the Army without payment to any such officer, noncommissioned officer or soldier of any compensation."

In support of this proposition I was referred to *Maxwell on The Interpretation of Statutes*, 12th Edition, where at p. 231 it is stated:

"*Substitution of words.*

Sometimes, where the sense of the statute demands it or where there has been an obvious mistake in drafting, a Court will be prepared to substitute another word or phrase for that which actually appears in the text of that Act."

This exceptional rule of construction, however, as the whole chapter is entitled, is subject to the rule, as stated in *Maxwell* (*supra*) at p. 228, that the modification of the language to meet the intention is permitted as follows:

"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended, a construction may be put upon it which modifies

the meaning of the words and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used."

But as pointed out, however, further, "the Courts are very reluctant to substitute words in a statute or to add words to it (see *R.* v. *Trafford* [1850] 15 Q.B. 200, per Lord Campbell C.J.; ante, pp. 33–39)" and it has been said that they will only do so where there is a repugnancy or something which is opposed to good sense. (*Fredericks* v. *Payne* [1862] 1 H. & C. 584, per Bramwell B.)

I am afraid in reading this section as it is I do not find that there is any repugnancy or something which is opposed to good sense, calling upon me to modify its language so as to meet what counsel suggests was the intention of the legislator which by a drafting mistake, was not achieved.

In my view the opinion of the Board can reasonably be expected, both in the case where a member of the army is found guilty of some misconduct and also where, though not found guilty the Board is still of the opinion that the one should still be dismissed and it is up to the Council of Ministers in either case to do so or not if in its opinion the person concerned is unsuitable to be a member of the army.

In view of this result, I need not examine the remaining grounds on which the application is based.

For all the above reasons the *sub judice* decision is annulled but in the circumstances I make no order as to costs.

Sub judice decision annulled. No order as to costs.