

1985 April 26

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

ALEXIA CHRISTOPHOROU AND OTHERS (No. 2),

Applicants.

v.

- THE REPUBLIC OF CYPRUS, THROUGH
1. THE MINISTRY OF EDUCATION,
 2. THE DIRECTOR OF HIGHER AND HIGHEST
EDUCATION,
 3. THE COUNCIL OF MINISTERS,

Respondents.

(Cases Nos. 440/84, 441/84, 448/84,
439/84, 452/84, 462/84 and 465/84.)

Practice—Stay of execution pending appeal—Discretion of the Court—Principles applicable—Refusal of application for stay will render appeal nugatory in case the appeal is successful—Application granted.

By means of a judgment which was delivered on the 22nd January 1985 this Court annulled the sub judice decision of the respondents to fix the number of candidates to be enrolled in the Teachers' Section of the Paedagogical Academy of Cyprus (P.A.C.) on the basis of percentages based on sex. On 24.1.85 respondents filed an appeal against the said judgment which was fixed for hearing before the Full Bench of this Court on 3.6.85. At the same time respondents filed an application for an order staying the execution of the said judgment till the determination of the Appeal. In an affidavit* in support of the application it was stated that if the stay of execution applied for is not granted, the undoubted right of the respondents to

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* The affidavit is quoted at pp. 678-679 post

appeal against the judgment of the Court will become nugatory.

5 *Held*, that a matter of this nature is purely a matter of discretion depending on the particular circumstances of each case; that though it is not the practice to deprive a successful litigant of the fruits of his litigation pending an appeal, on the other hand, when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory; and that, 10 thus, there will be granted a stay of execution, pending appeal where the special circumstances of the case so require; that in the exercise of its relevant discretionary powers, this Court will grant the application and preserve the existing position pending the determination of the appeal; 15 that if the application is refused, in case the appeal is successful, it will be nugatory as the repercussions on the interested parties will be detrimental, whereas the successful applicants who by today they have already lost the opportunity of following up the lessons of the first academic year will not suffer further loss to that already suffered by them and in respect of which they may pursue other remedies. 20

Application granted.

Cases referred to:

25 *Katarina Shipping Inc. v. The Cargo on Board the Ship "Poly"* (1978) 1 C.L.R. 355 at pp. 360, 361;

Veis and Others v. Republic (1979) 3 C.L.R. 537 at pp. 543-544;

Veis and Others v. Republic (1979) 3 C.L.R. 390.

30 **Application.**

Application by respondents for an order staying the execution of the judgment delivered on the 22nd January, 1985 till the determination of Revisional Appeal No. 433 against the said judgment.

35 *A. Evangelou*, Senior Counsel of the Republic, for the applicants-respondents.

A. S. Angelides, for the respondents in this application-applicants.

Cur. adv. vult.

SAVVIDES J. read the following decision. By means of a judgment which I delivered on the 22nd January, 1985, I annulled the sub judice decision of the respondents to fix the number of candidates to be enrolled in the Teachers' Section of the Paedagogical Academy of Cyprus (P.A.C.) on the basis of percentages based on sex. On 24.1.85 respondents filed an appeal (Revisional Jurisdiction Appeal No. 433) against my said judgment which is fixed for hearing before the Full Bench of this Court on 3.6.85. At the same time respondents filed the present application for an order staying the execution of the said judgment till the determination of the said Revisional Jurisdiction Appeal 433. The application is supported by two affidavits, the first sworn by Mr. Stavros Filippides, the Director of Higher Education and the second by Mr. Marios Fotiou, one of the interested parties on behalf of all interested parties.

According to the contents of the affidavit of Mr. Stavros Filippides:-

"... if the stay of execution applied for is not granted, the undoubted right of the respondents to appeal against the judgment of the Court becomes nugatory for the following reasons:

(a) If the respondents comply at this stage with the judgment of the Court, they will have to dismiss from the Paedagogical Academy all interested parties who had been accepted as students in the first year of studies five months before the sub judice decision was annulled.

(b) If finally the respondents succeed with their appeal, they will not benefit as they will not be in a position to restore the loss which will be caused to the interested parties.

As regards the successful applicants, their enrolment in the first year of studies will not serve any useful purpose for them, for the following reasons:

(a) As we are now in the middle of the academic year, the follow-up of lessons will become problematic as they have lost the previous lessons.

5 (b) According to the regulations of the Paedagogical Academy they will be bound to repeat the lessons of the first year in the next academic year, due to the periods of absence from lessons.

10 Therefore, even in case the appeal fails and the first instance judgment is affirmed, the applicants will not suffer any further loss to that they allege they have already suffered as they have already lost their chance of utilizing academic year 1984-1985."

Affiant concluded his affidavit as follows:

15 "In the light of the above bearing in mind the fact that the respondent is the Republic of Cyprus which is in a position to compensate the applicants in case the stay applied for is unfounded and also taking into consideration the fact that the applicants will be entitled to the remedies envisaged by paragraph 5
20 of Article 146 of the Constitution, I honestly believe and I have been so advised legally that there are sufficient special reasons justifying the stay applied for.

25 According to the affidavit of Mr. Marios Fotiou, one of the interested parties, sworn on behalf of all interested parties, the following allegations in support of the application, are advanced:

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30 If the respondents are forced to comply with the decision of the Court at this stage they will have to dismiss from the Paedagogical Academy all interested parties who had been accepted in the first year of studies five months ago on the basis of the decision which has been annulled by the Court. Their dismissal
35 will amount to irreparable loss as all interested parties at the time of their enrolment at the P.A.C. they had secured places in Universities or other Higher

Schools which they lost as a result of their enrolment at the P.A.C.

Furthermore most of the interested parties were granted suspension of service in the National Guard due to their enrolment in the P.A.C.. In case of dismissal from the P.A.C. then the suspension of their military service will be terminated and they will be bound to enlist in the National Guard. If, finally, the appeal succeeds the interested parties will not be benefited as in the meantime they would have enlisted in the National Guard and would have lost the current academic year. Therefore, it would be neither just nor practical that the above events do take place before the decision of the Court of Appeal in these cases."

The application was opposed by the applicants in the recourses. In support of their opposition applicants filed an affidavit sworn by one of them, namely, Miss Varvara Petrou. The matters set out by the affiant, in support of the opposition, are briefly the following:

(a) The applicants in the recourses were successful in their recourses and are persons who had been affected by the sub judge decision which was challenged and which has now been annulled by the decision of the Court.

(b) Any further extension of the operation of the contested decision, by way of stay of execution, will cause further and irreparable loss to them and their career.

(c) The question of any repercussions on the interested parties which may result till the determination of the appeal, in case they succeed, may be avoided by any conditions which the Court may deem necessary to impose under section 47 of Law 14/60.

In any event the matter may be arranged as it was done on a previous occasion in *Loizides* case by accepting her as an additional student without at the same time dismissing the interested parties.

(d) The contention that the following up of lessons by the successful applicants "will be problematic" does not

mean that their following up of the lessons as from today is impossible.

5 (e) The violation of the regulation concerning regular attendance for certain periods during the academic year is not due to the fault of the successful applicants who had been deprived unjustifiably from attending the lessons.

10 (f) The question of compensation is not a reason justifying the stay of execution of the judgment nor can it cure the loss of career of the applicants or the violation of a constitutional requirement.

15 The application was fixed for hearing on 5.3.1985. Counsel for the successful applicants stated that he was opposing the application for stay only to the extent of the non-acceptance of the applicants in the P.A.C. and not concerning the dismissal of the interested parties. Counsel for respondents, applicants in the application for stay, submitted that if such course is followed, it will amount to accepting supernumerous students in excess of the number fixed by the Council of Ministers. Furthermore, if the appeal failed and the admissions were reconsidered, there were other female candidates who had achieved higher grades at the entrance examinations and who had a more legitimate claim to be accepted in preference to the successful applicants.

25 Counsel for respondents in arguing his application for stay of execution submitted that the grounds set out in the affidavits filed in support of the application justify the granting of the stay applied for and expounded on such grounds. He concluded that if the stay is not granted and 30 the appeal is successful, it will be nugatory for the reasons stated in the affidavits filed.

35 Counsel for successful applicants expounded on the grounds set out in the affidavit in support of the opposition. He submitted that the judgment of the Court annulling the decision of the respondents if complied with would have two effects; The first will be the dismissal of the interested parties who were wrongly admitted in preference to the applicants and the second the admission of the applicants in the P.A.C.. The applicants have never objected to the 40 stay of execution of that part of the decision concerning the

dismissal of the interested parties and in fact if such course is adopted any irreparable loss on the interested parties pending the determination of the appeal will be avoided. What applicants are objecting, counsel added, is stay of the annulling effect of the judgment concerning the admission of the applicants. In the submission of counsel for applicants such course could be adopted at a cost of £25.- per month for each one of the applicants which is the amount of the grant for each student during his studies at the P.A.C.

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The principles applicable to the matter of stay of execution pending appeal, are to be found summarised in *Katarina Shipping Inc. v. The cargo on board the Ship "Poly"* (1978) 1 C.L.R. 355, in which Triantafyllides, P., said the following at pp. 360, 361:

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"In spite of the differences in wording between our rule 8 of Order 35, the previous rule 16 of Order 58 in England and the present rule 13 of Order 59 in England, it appears that the principles governing the exercise of judicial discretion in a matter of this nature have remained unchanged; and they are set out in The Supreme Court Practice, 1976, supra, at p. 880.

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In brief, they are that though it is not the practice to deprive a successful litigant of the fruits of his litigation pending an appeal, on the other hand, when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory; thus there will be granted a stay of execution, pending appeal, where the special circumstances of the case so require.

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It has been laid down that a matter of this nature is purely a matter of discretion, depending on the particular circumstances of each case (see *The Ratata*, [1897] P. 118, 132); and it is also, well settled that the approach to such a matter is the same as in other cases even when stay of execution pending appeal is sought in admiralty proceedings; in other words, the same principles apply to a stay of execution pending appeal in admiralty proceedings as to a stay of execution

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pending appeal in other proceedings (see, in this respect, *The Annot Lyle*, [1886] 11 P. 114, 116)."

The same principles were reiterated in *Michael Veis and others v. The Republic* (1979) 3 C.L.R. 537 in which an application for stay of execution pending a Revisional Jurisdiction Appeal was granted subject to certain conditions. Triantafyllides, P. in his judgment expounded further on the power of the Court to grant a stay in Revisional Jurisdiction Appeals. He had this to say at pp. 543, 544:

"In ordering, as was stated above, a stay of execution of my judgment of July 30, 1979, until the determination of the aforementioned Revisional Jurisdiction Appeal, I do not have to resort to the powers granted by means of rule 19 of the Supreme Constitutional Court Rules or of section 47 of Law 14/60, as it suffices to exercise, in this connection, the powers vested in me under rules 18 and 19 of Order 35 of the Civil Procedure Rules, which read as follows:

'18. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from except so far as the Court appealed from or the Court of Appeal or a Judge of either Court, may order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct. Before any order staying execution is entered, the person obtaining the order shall furnish such security (if any) as may have been directed. If the security is to be given by means of a bond, the bond shall be made to the party in whose favour the decision under appeal was given.

19. Wherever under these rules an application may be made either to the Court below or to the Court of Appeal, or to a Judge of either Court, it shall be made in the first instance to the Court or Judge below.'

The said rules are applicable to the present proceedings by virtue of rule 3 of the Appeals (Revisional Jurisdiction) Rules of Court of the Supreme

Court, 1964 (see No. 2 in the Second Supplement to the Official Gazette of the Republic of November 19, 1964)."

In his judgment in the recourse in *Veis and others v. The Republic* (1979) 3 C.L.R. 390, annulling the sub judice decision in that case, the trial Judge found it necessary, without having before him an application for stay of execution pending an appeal, to order provisional stay of execution for six weeks pending the filing of an appeal, for the purpose of preserving the status quo. He had to say the following in this respect, at p. 417: 5 10

"I have decided to take the exceptional course of staying, in the exercise of my powers under rule 19 of the Supreme Constitutional Court Rules, as well as under section 47 of the Courts of Justice Law, 1960 (Law 14/60), the execution of this judgment for the period of six weeks during which an appeal may be made against it, so as to preserve the existing position while both sides will be considering such an eventuality." 15

Bearing in mind what was said by both counsel, in the light of all material before me and having paid due regard to the principles applicable to the matter of stay of execution as summarised in *Katarina Shipping Co. Inc. v. The Cargo on Board the Ship "Poly"* (supra) I have decided, in the exercise of my relevant discretionary powers, to grant the application and preserve the existing position pending the determination of the appeal. If I refuse the application, in case the appeal is successful, it will be nugatory as the repercussions on the interested parties will be detrimental, whereas the successful applicants who by today they have already lost the opportunity of following up the lessons of the first academic year will not suffer further loss to that already suffered by them and in respect of which they may pursue other remedies. As to the submission of counsel for applicants that applicants have no objection to a stay only of that part of the judgment which may affect the interested parties but not of the part by which a right was recognised for the applicants to be admitted in the P.A.C. I find myself unable to make any direction to that extent. By making any condition to the order for stay applied for safeguarding the provisional admission of the applicants, I shall disturb 20 25 30 35 40

the decision of the Council of Ministers fixing the maximum number of students for enrolment for the academic year 1984-1985 which was taken within the limits of the Annual Budget of the Republic and such conditions will have the effect of imposing an additional financial burden not provided by the Budget. On the other hand if the appeal fails, and the case is reconsidered by the appropriate authorities in the light of my judgment, it is not certain whether the applicants will be the only persons eligible for admission or whether there are other female candidates higher in the order of success in the entrance examinations who may have a more legitimate interest to be admitted, compared to the applicants.

In the result the application for stay of execution of the judgment, pending the determination of the appeal is granted and an order is made accordingly. In the circumstances, there will be no order for costs.

Application granted.