

1987 August 31

(A LOIZOU, J.)

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHARALAMBOS KAPSOU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 548/84).

Acts or decisions in the sense of Art. 146.1 of the Constitution — An act cannot be made the subject of a recourse, if, though at one time executory, has lost its executory character.

Executory act — Merger or embodiment in a new act issued after a substantial new inquiry — First act loses its executory character.

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Recourse for annulment — Practice — Withdrawal of recourse «with reservation of rights» upon a statement that the respondent intends to re-examine matter — Effect of such «reservation of rights» — It cannot go beyond the obligation of the respondent to re-examine the matter and issue a new executory decision.

The applicant challenged the appointments made in 1981 to the post of Attaché in the Ministry of Foreign Affairs. As a result the appointment of one of the interested parties was annulled and, consequently, the Commission re-examined the matter and appointed the applicant as from 1.6.84.

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As a result the applicant, who accepted his appointment with reservation of rights, filed this recourse, seeking the annulment of the omission to appoint him retrospectively as from 1981.

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At some stage of the proceedings counsel for the respondent stated that he would advise the Commission to re-examine the matter.

As a result the applicant withdrew this recourse with reservation of rights.

The Commission re-examined the matter and appointed the applicant retrospectively, but this decision was later annulled by this Court in *Ieronymides and Others v. The Republic* (1986) 3 C.L.R. 2424.

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Following the said annulment the applicant sought and obtained the reinstatement of this recourse. The question now is whether the recourse has been deprived of its subject-matter.

5 Held, *dismissing the recourse*: (1) An act or decision cannot be the subject of a recourse if though executory at one time it lost later its executory character.

One of the reasons for losing its executory character is when the act is merged or embodied in another executory act. An instance when such a merger occurs is when the new act is issued after a substantial new inquiry.

10 (2) In this case there was issued a new executory decision. The reservation of applicant's rights when he withdrew the recourse could not go beyond the duty of the Commission to re-examine the issue, as indeed it did. This recourse has been deprived of its subject-matter.

Recourse dismissed.

15 *No order as to costs.*

Recourse.

Recourse against the omission of the respondent to appoint applicant to the post of Attaché in the Foreign Service of the Republic with retrospective effect as from 1st September, 1981.

20 Applicant appeared in person.

R. Gavrielides, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

25 A. LOIZOU J. read the following judgment. In 1981 there was a number of vacancies in the post of Attaché in the Ministry of Foreign Affairs. The applicant was one of the candidates who applied for appointment to such post. As he was unsuccessful he challenged the appointment of five successful candidates to the said post by means of a recourse - No. 356/81. The Supreme
30 Court by its judgment reported as *Kapsou v. The Republic* (1983) 3 C.L.R. 1336, annulled the decision of the respondent Commission with regard to the appointment of only one of the interested parties, namely Evripides Evriviades, to the above post with effect from 1st September 1981.

35 On the 29th March 1984, the respondent Commission reconsidered the question of the filling of the post of Attaché which remained vacant, as a result of the annulling judgment of the Supreme Court and selected the applicant for appointment and by

letter dated the 3rd April 1984, offered him appointment to the said post on probation for two years. The applicant accepted the appointment but, at the same time, he requested that it should be given retrospective effect as from the date when the appointment of Evriviades was annulled, i.e. the 1st September 1981. He also requested that the period of his probation be modified. 5

The respondent Commission, after obtaining the advice of the Attorney-General, decided to reject both the request of the applicant for retrospective appointment and that for the modification of his probationary period and fixed the 1st June 1984 as the date of his appointment. 10

The applicant accepted the appointment with reservation of his rights and on the 12th October 1984, he filed the present recourse praying for:

«A. declaration of the Court that the omission of the respondent Commission to appoint the applicant to the post of Attaché in the Foreign Service of the Republic with retrospective effect as from 1st September, 1981 as it ought to have done, following the partial annulling decision of the Court in the case of *Kapsou v. The Republic* (1983) 3 C.L.R. 1336, is null and void and whatever has been omitted ought to have been performed. 15 20

B. A declaration of the Court that the act and/or omission of the respondent Commission to appoint the applicant on probation for two years without taking into consideration the probation service of the applicant in another first entry post is null and void and whatever has been omitted ought to have been performed. 25

C. A declaration of the Court that the omission of the respondent to reinstate the applicant to the advancement in the service which he would have, had it not been for the intervention of (A) above, and taking into consideration his service which would have been reckoned on the basis of recognition of service for a post-graduate degree of the applicant, is null and void and whatever has been omitted ought to have been performed.» 30 35

The applicant's written address was filed on the 12th March, 1985. On the 22nd May, 1985, however, counsel for the respondent Commission made a statement to the effect that he

intended to advise the respondent Commission to re-examine the matter and appoint the applicant to the post of Attaché in the foreign service of the Republic as from the 1st September 1981. Furthermore that he would advise the Commission to examine
5 after such appointment the possibility of promoting the applicant to the post of Secretary and take steps for his full retroactive reinstatement. Thereupon the applicant stated orally and in writing in Court and also filed a statement in writing that in view of the statement of counsel for the Republic he withdrew his recourse
10 «with full reservation of his rights». He then expressed his appreciation for the way the case had been handled.

Indeed the respondent Commission obviously in the light of the advice of counsel re-examined the matter at its meeting of the 29th May 1985 and decided that the applicant's appointment to the
15 post of Attaché should take effect retrospectively as from the 1st September 1981.

This latter decision was challenged by other persons claiming legitimate interest in the matter and was eventually annulled by the Supreme Court on the 22nd December 1986, by its judgment in
20 the case of *Ieronymides and Others v. The Republic*, Recourse No. 843/85 (judgment as yet unreported)*.

Following the annulment of his retrospective appointment the applicant sought reinstatement of the present recourse to which counsel for the respondent did not object and same was
25 reinstated on the 19th February 1987.

Learned counsel for the respondent in his written address put forward a single submission, namely «that the recourse should be dismissed as lacking subject matter. The prayer of the recourse was satisfied by the respondent if later for other reasons the
30 relevant decision of the Public Service Commission was annulled by the Court it is irrelevant.»

On the other hand the applicant who handled his case personally, in reply to the above submission mainly contended that by his non-appointment as from 1st September 1981 he has
35 suffered and continues suffering detriment because he has been deprived of the proper seniority and as a result his seniority in the service is prejudicially affected.

It is a well established principle of Administrative Law that an administrative act or decision cannot be the subject of a recourse

* Reported in (1986) 3 C.L.R. 2424.

if though executory at one time it lost later for a number of reasons its executory character. One of those reasons is where there is a merger or the executory act or decision has lost its executory character by being embodied in another executory act. There are several instances that bring about this merger one of them is by being embodied in a subsequent act issued after a substantial new inquiry of the case on the same subject matter. In this way the act against which either a hierarchical recourse or generally a recourse for a relief or remedy has been made it has been embodied after a new inquiry of the case in a new act duly issued. (See Case Law of the Greek Council of State 1929-1959 pp. 241-242 and the decisions referred to therein inter alia 801/53 1388/53.)

In the present case the full reservation of his rights by the applicant, were made in respect of the obligation undertaken by counsel for the respondent Commission to proceed into a new inquiry and on proper legal advice arrive at a new decision. This obligation so undertaken was duly discharged. A new executory decision was issued, in fact favourable to the applicant and therefore the old decision subject matter of the present recourse , merged into the new one and lost its executory character. Hence this recourse being without subject matter. The applicant's reservation of rights could not go beyond the discharge of the duty of the respondent Commission to re-examine and issue a new executory decision.

For all the above reasons this recourse is dismissed but in the circumstances there will be no order as to costs.

*Recourse dismissed.
No order as to costs.*