

1985 August 30

(TRIANAFYLIDIS, P. L. LOIZOU, DEMETRIADES, SAVVIDES JJ)

LANITIS BROS LTD.,

Appellant,

v.

THE CENTRAL BANK OF CYPRUS,

Respondent.

(Revisional Jurisdiction Appeal No. 212).

Revisional Jurisdiction Appeal — Powers of Court — Court may try and decide issue whether sub judice act is of an executory nature, notwithstanding that such an issue was neither tried nor decided by the trial Judge — The Court is seised of the case as a whole.

5 *Executory act — Confirmatory act — Cannot be challenged by a recourse under Art. 146.1.*

Executory act — Preparatory act — Cannot be challenged by a recourse under Art. 146.1

10 *Executory act — Informative act — Cannot be challenged by a recourse under Art. 146.1*

Executory act — Joint statement of counsel to the effect that sub judice decision was reached upon new application and after reconsideration of matter — Does not alter the real nature of the decision, which, in the circumstances, is not executory.

15 On 23 October 1973 the appellant was treated as being resident in Cyprus, but controlled by persons resident outside the Republic. There followed lengthy oral and written communications between counsel for the parties which culminated in a letter dated 30 January 1978, in which there were given the reasons for deciding to consider the appellant company as being
20 controlled by non-residents of the Republic

One such reason was that the Central Bank did not have evidence as regards the extent to which the shareholding of the appellant company was beneficially owned by residents in Cyprus.

The recourse of the appellant directed against the decision, communicated by the letter of 30 1 78 was dismissed Hence this appeal

It must be noted that though there was raised in the opposition the preliminary issue that the sub judice decision is not of an executory nature, the issue was not tried or decided by the trial Judge

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A joint statement of counsel filed in the course of this appeal asserted that the sub judice decision was reached after a new application by appellant to the respondent and after reconsideration of the matter by the latter

Held, *dismissing the appeal* (1) The issue whether the sub judice decision is of an executory nature may be examined in the context of this appeal This Court is seized of the case as a whole

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(2) The sub judice decision is confirmatory of the earlier decision of the respondent of 23 October 1973 To the extent to which the said decision is not confirmatory and, in particular, in relation to the aforementioned reason, such decision was of a preparatory nature

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Looked upon as a whole the decision contained in the relevant part of the aforesaid letter of 30 January 1978 can be described, also, as a decision of an informative nature, informing the appellant concerning the intentions of the Central Bank

(3) The contents of the joint statement of counsel for the parties cannot alter the real nature of the sub judice decision so as to render it executory once in substance and in fact it was not executory

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*Appeal dismissed No order
as to costs*

Cases referred to

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Lanitis Bros Limited v The Central Bank of Cyprus (1979) 3 C L R 176,

Ktenas (No 1) v The Republic (1966) 3 C L R 64,

Lanitis Bros Limited (No 2) v The Central Bank of Cyprus (1974) 3 C L R 328,

Dr N G Marangos Ltd v The Municipality of Famagusta (1979) 3 C L R 73,

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Pavlidis v The Republic (1977) 3 C L R 421,

Tanis v The Republic (1978) 3 C L R 314,

HadjiPanayi v The Municipal Committee of Nicosia (1977) 3 C L R 300,

The Republic v Georgiades (1972) 3 C L R 561

Appeal.

Appeal against the judgment of a Judge of the Supreme Court of Cyprus (A. Loizou, J) given on the 1st June, 1979 (Revisional Jurisdiction Case No. 138/78*) whereby appellant's recourse
 5 against the decision of the respondent to treat the appellant company as being resident in Cyprus but controlled by non-residents and therefore, not being able, without the permission of the Central Bank, to borrow money from residents in Cyprus was dismissed.

10 *R. Johnson Q.C. with G. Polyviou and K. Michaelides, for the appellant.*

A. Evangelou, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

15 TRIANTAFYLLIDES P. read the following judgment of the Court. On 15 November 1984 the proceedings in this case were stayed and the delivery of the reserved judgment was postponed until there would be purged, to the satisfaction of this Court, contempt of Court which had been committed by the chairman of the appellant company and which was regarded as attributable to
 20 such company too.

Subsequently, the contempt was purged in a mode which we considered satisfactory, namely by means of a unanimous resolution of the board of directors of the appellant company which not only disassociated the company from the
 25 communications of its chairman which resulted in the commission of contempt of Court as aforesaid, but, also, condemned such communications and expressed profound regret for them.

We, therefore, propose to deliver now the reserved judgment in this case and, as was already stated on 15 November 1984, when
 30 we made the order staying the proceedings, our now stated to be the conclusion regarding the outcome of this case has been unanimously reached prior to the 13 February 1984; and, consequently, the retirement, in the meantime, of one of the Judges who heard this appeal, Mr. Justice Hadjianastassiou, does
 35 not prevent us from delivering our judgment now:

* Reported in (1979) 3 C.L.R. 176

This appeal has been made against the first instance judgment of a Judge of this Court by means of which there was dismissed a recourse of the appellant company against the decision of the respondent Central Bank of Cyprus to treat the company as being resident in Cyprus but controlled by non-residents and, therefore, not being able, without the permission of the Central Bank, to borrow money from persons resident in Cyprus (see section 32(3) of the Exchange Control Law, Cap. 199, as amended by the Exchange Control (Amendment) Law, 1972 (Law 53/72)).

The facts of this case are set out lucidly in the carefully prepared first instance judgment of the learned trial Judge (see *Lanitis Bros. Limited v. The Central Bank of Cyprus*, (1979) 3 C.L.R. 176) and, therefore, we need not repeat them.

The sub judice decision was to be found, according to counsel for the appellant, in a letter of the respondent dated 30 January 1978.

When the Opposition to the recourse was filed a preliminary objection was raised that the complained of decision of the respondent was not of an executory nature; and that, consequently, no recourse could be made against it under Article 146 of the Constitution.

It is true that when the case was argued before the learned trial Judge counsel stated that they had agreed not to argue preliminary issues but to argue only the merits of the case and, as a result, the said preliminary objection of counsel for the respondent that the complained of decision was not of an executory nature was not argued before, or decided by, the trial Judge.

This Court decided, in the course of the hearing of the present appeal, to consider the issue of whether the sub judice decision is of an executory nature as it is a matter relevant to its competence to exercise judicial control over such decision under Article 146 of the Constitution.

Such course was clearly open to us (see, for example, in this respect, *Ktenas (No.1) v. The Republic*, (1966) 3 C.L.R. 64, 70); and we have invited and heard arguments from counsel on both sides on the issue in question.

On 23 October 1973 the appellant was treated as being resident in Cyprus but controlled by persons resident outside the Republic and its financiers in Cyprus were informed by the respondent Central Bank that for exchange control purposes the continuation
5 of granting banking facilities to the appellant company required the approval of the Central Bank (see, in this respect, *Lanitis Bros. Limited (No. 2) v. The Central Bank of Cyprus*, (1974) 3 C.L.R. 328, 332).

There followed lengthy oral and written communications
10 between counsel for the parties which culminated in the aforesaid letter of 30 January 1978, in which there were given the reasons for deciding to consider the appellant company as being controlled by non-residents of the Republic.

One such reason was that the Central Bank did not have
15 evidence as regards the extent to which the shareholding of the appellant company was beneficially owned by residents in Cyprus.

We have reached the conclusion, after careful consideration of the matter, that the sub judice decision is confirmatory of the
20 earlier decision of the respondent on 23 October 1973 and, therefore, it could not be challenged as an executory decision, under Article 146 of the Constitution, by the recourse which was determined by the judgment against which this appeal was made (see, inter alia, in this respect, *Dr. N.G. Marangos Ltd. v. The Municipality of Famagusta*, (1979) 3 C.L.R. 73 and the case-law referred to in the judgment in that case, at p. 76).

To the extent to which the said decision is not confirmatory and, in particular, in relation to the reason given by the Central Bank that there was not before it evidence as regards the extent to which
30 the shareholding of the appellant company was beneficially owned by residents in Cyprus, such decision was of a preparatory nature and it was, therefore, again not of an executory nature and could not be made the subject-matter of a recourse under Article 146 of the Constitution (see, inter alia, in this respect, *Pavlidis v. The Republic*, (1977) 3 C.L.R. 421 and *Tanis v. The Republic*,
35 (1978) 3 C.L.R. 314).

Looked upon as a whole the decision which is contained in the first part of the aforesaid letter of 30 January 1978 - (and we are

not concerned with the second part of (that letter) - can be described, also, as a decision of an informative nature, informing the appellant company of the intentions of the Central Bank and, again, because of such nature, it is not an executory decision which may be challenged by a recourse under Article 146 of the Constitution (see, inter alia, in this respect, *HadjiPanayi v. The Municipal Committee of Nicosia*, (1974) 3 C.L.R. 366).

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During the hearing of this appeal there was filed a joint written statement by counsel for the parties to the effect that, after meetings held in the Office of the Attorney-General which were attended by representatives of both parties, it was agreed that the appellant company would make a new application to the Central Bank, in the light, among other things, of all that had transpired at such meetings, and that a new application having been made the Central Bank reconsidered the matter and reached a new decision which is to be found in the aforementioned letter of 30 January 1978.

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In our view, however, the contents of this joint statement of counsel for the parties cannot alter the real nature of the sub judice decision so as to render it executory once in substance and in fact it was not executory.

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For all the foregoing reasons this appeal fails and has to be dismissed on the ground that the appellant company, in any event, could not have challenged the sub judice decision by means of a recourse under Article 146 of the Constitution; and this Court can reach this conclusion irrespective, and independently, of the reasons for which the learned trial Judge dismissed the recourse of the appellant company, because in an appeal such as the present one this Court is seised of the case as a whole (see, inter alia, in this respect, *The Republic v. Georghiades*, (1972) 3 C.L.R. 594).

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We do not propose to make any order as to the costs of this appeal.

*Appeal dismissed.
No order as to costs.*