

1988 November 10

(A. LOIZOU, P., MALACHTOS, DEMETRIADES, STYLIANIDES, PIKIS, JJ.)

PHOTOS PHOTIADES, PERSONALLY AND/OR IN HIS CAPACITY
AS PARTNER OF PHOTOS PHOTIADES AND COMPANY
AND ANOTHER,

Appellants-Interested Parties,

v.

TAKIS PHOTIADES,

Respondent-applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH

1. THE MINISTER OF COMMERCE AND INDUSTRY,
2. THE OFFICIAL RECEIVER AND REGISTRAR AND OTHERS,

Respondents.

(Revisional Jurisdiction Appeals Nos. 692, 697).

Partnerships—Registration of—The Partnership Law, Cap. 116, section 56 (1)—The registration is neither an executory act nor does it belong in the domain of public law.

Executory act—Registration of a partnership under Cap. 116—It is a ministerial, not an executory act.

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Acts or decisions in the sense of Art. 146.1 of the Constitution—The test in determining whether an act is in the domain of public or private law—The registration of a partnership under Cap. 116 is in the domain of private law.

The question in this case was whether the act of the Registrar of Companies to register a renewal of a partnership pursuant to a notice sent by one

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of the partners is reviewable as the trial Judge had held, by means of a recourse for annulment.

Held, allowing the appeal: 1) The Registration of a partnership under Cap. 116 is a ministerial, not an executory act, because it does not create rights, additional to those deriving from the partnership contract. The registration makes possible the keeping of public records about the existence of partnership and inspection at a specified fee of the register kept thereby. Neither the keeping of a register nor its availability for inspection can possibly alter the character of the act of registration.

2) There is no analogy between registration of trade marks and registration of partnerships. The former does not depend on agreement between parties; the anonymous public is affected thereby. The interest, on the other hand, of third parties in the existence of a partnership, is limited to those who trade or contemplate trading with the partnership. The classification of the registration of a partnership can appropriately be compared to the registration of mortgages under the Company Law.

3) A substantive criterion is applied to determine the domain of the law into which particular action of the Administration belongs, revolving on the purpose it is intended to promote and the degree to which it is subordinate to the dominant purpose. The sub judice decision is in the domain of private law.

*Appeal allowed.
Recourse dismissed.*

Cases referred to:

- 25 *I.W.S. Nominee Co. Ltd. v. The Republic* (1967) 3 C.L.R. 582;
Merck v. The Republic (1972) 3 C.L.R. 548;
The Company Carlo Erba spa v. The Republic (1977) 3 C.L.R. 427;
Hellenic Bank v. The Republic (1966) 3 C.L.R. 481;
York International Securities Ltd. v. The Republic (1987) 3 C.L.R. 834;
30 *Ieropoulos v. District Lands Officer Limassol* (1987) 3 C.L.R. 830;

Westpark Limited v. The Republic (1987) 3 C.L.R. 1473;

Mahlouzarides v. The Republic (1985) 3 C.L.R. 2342;

Antonioni and Others v. The Republic (1984) 3 C.L.R. 623.

Appeal.

Appeal against the judgment of the President of the Supreme Court of Cyprus (Triantafyllides, P.) given on 29th November, 1986 (Revisonal Jurisdiction Case No. 89/86)* whereby the decision of the respondent to renew the term of Partnership "Photos Photiades & Co." for a further period of five years as from 1.8.1985 was annulled.

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Chr. Clerides, for the appellants—interested parties.

Cl. Theodoulou (Mrs.), Senior Counsel of the Republic, for appellants in R.A. 697.

Chr. Triantafyllides, for respondents.

Cur. adv. vult.

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A. LOIZOU P.: The judgment of the Court will be delivered by Pikis, J.

PIKIS J.: Photos and his brother Takis Photiades, were partners in equal shares in the partnership styled "PHOTOS PHOTIADES & CO."; their share in the partnership was 65% and 35% respectively. The partnership was registered with the Registrar of Partnerships for a period of ten years. It expired at the end of July, 1985, a fact notified by the Registrar to the partnership, accompanied by a query whether its renewal was contemplated. Following the reminder a notice for its renewal for a period of five years was submitted to the Registrar, in the prescribed form.

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* Reported in (1987) 3 C.L.R. 1490.

On 31st August, 1985, the Registrar issued, pursuant to the provisions of s.56(1) of the Partnership Law, Cap. 116, a certificate for the extension of the partnership for a five-year period. The entry in the register was gazetted (Fifth Supplement) on 20th
5 December, 1985, in accordance with s.59 - Cap. 116. Takis Photiades objected to the registration and challenged its validity for misconception of material facts. The Registrar acted, in his contention, without inquiring into the facts, particularly, without eliciting his intentions as to the extension of the expired partnership.
10 The notice for the registration was signed, unknown to him, by his partner and allegedly contrary to his wishes. For his part Photos Photiades maintained the extension was made in accordance with an agreement of the parties and relevant notice was signed by him on behalf of the partnership in accordance with a standing
15 decision of the partners.

Before the institution of the present proceedings, an action was instituted before the District Court of Nicosia with a view to setting aside the transfer of a piece of immovable property belonging to the partnership to a limited company in which the shareholding
20 of the two brothers corresponded to the percentage of their share in the partnership. The institution of the civil action was accompanied by an application for an interim order designed to prevent the partnership from alienating any of its property pending the determination of the action. The interim order made on the ex parte application of Takis Photiades was subsequently discharged for failure
25 on the part of the motioner to make full disclosure of the facts.

The institution of the present proceedings coincided with the discharge of the interim order. A fair inference is that the present proceedings were mounted as a direct sequence of the discharge
30 of the injunction earlier issued in the civil action, and with a view to securing analogous injunctive relief.

Triantafyllides, P., as he then was, set aside the registration of the partnership, mainly on the ground that it was made either in
35 ignorance of material facts or without proper inquiry into them. In

particular, it was found that the Registrar failed to elicit the wishes of both partners before approving the extension of the partnership for a further period of five years. Earlier, the learned President decided that the registration of a partnership under s.56(1) of the Partnership Law, was an executory decision of a character sounding in the domain of public law. In fact, he made a provisional order upon the institution of the proceeding suspending for all purposes the efficacy of the registration or representing that it subsisted. Registration was, inter alia, intended, as he noted in his first judgment, to promote the purposes set forth by s.60 of Cap. 116, that is, facilitate inspection by third parties. And by analogy to the implications deriving from the registration of trade marks noticed in *I.W.S. Nominee Co. Ltd. v. The Republic* (1967) 3 C.L.R. 582, *Merck v. The Republic* (1972) 3 C.L.R. 548 and *The Company Carlo Erba spa v. The Republic* (1977) 3 C.L.R. 427 he concluded that a decision to register a partnership operates in the domain of public law and as such is justiciable under article 146.1. Sequentially to his first judgment, he debated further the character of the decision with a view to determining whether it was executory. He decided that registration under s.56(1) had the attributes of an executory administrative act "In as much as the sub judice administrative action was intended to clothe with formal validity the renewal, for five years, of the new partnership in question, I am of the opinion that it was administrative action which brought about a legal situation creating and affecting rights of the said partnership and of its partners, one of whom is the applicant; and, therefore, it is administrative action of an executory nature." Separate appeals were filed against the two judgments that at the end of the day merged into one, revolving on the following three issues:

- (a) The character of the act of registration of a partnership;
- (b) the domain of law in which the act of registration falls; and
- (c) if justiciable, the merits of the decision.

5 Counsel for the appellants argued that the partnership and mat-
ters incidental thereto, are primarily matters of private law cong-
nizable by a civil court, as laid down in the Partnership Law it-
self. Moreover, he submitted that the decision is not executory
because it leaves essentially unaffected the rights and obligations
of the partners. The action of the Registrar is no more than a cer-
tification with no noticeable effects in itself on the rights of the
parties. The action was raised, counsel submitted, because the ef-
10 ferts of the applicant to secure an interim order by a civil court
were frustrated by the discharge of the order. The action before
the civil Court, it must be stated, was eventually discontinued un-
der Ord.15, r.1, of the Civil Procedure Rules and the appeal
abandoned. If the merits were to be probed at all; Photos Pho-
15 tiades was authorised by the terms of the partnership and the
agreement of the partners to sign notices and documents on behalf
of the partnership, a fact establishing that the prerequisites for an
extension were duly complied with.

20 For his part, counsel for the respondent submitted that the ex-
tension had direct consequences on the position of the partners in
that it converted a partnership at will, the position that emerged at
the expiration of the ten-year period, into a partnership for a fixed
term. The analogy with trade marks was highly pertinent, in so
far as the charting of the domain of law was concerned; the action
of the Registrar was reviewable and bound to be set aside, as
25 counsel contended, in view of the failure on the part of the Regis-
trar to carry out any inquiry into the background of the facts.

*Character of the decision of the Registrar of Partnerships un-
der s.56(1) of the Partnership Law, Cap. 116, and reviewability
under Article 146.1 of the Constitution:*

30 For a decision to be executory, it must be generative of rights.
Only decisions creative in themselves of rights are justiciable un-
der article 146.1 of the Constitution. The registration of a partner-
ship does not per se confer rights on the partners additional to
those that they enjoy in contract, as a result of the formation of a
35 partnership between two or more persons, nor does it impose any

additional obligations. The learned trial Judge does not say otherwise, as I read his judgment. All he says is that it confers formal validity to the agreement. It makes possible the keeping of public records about the existence of partnership and inspection at a specified fee of the register kept thereby. Neither the keeping of a register nor its availability for inspection can possibly alter the character of the act of registration. The act of registration is par excellence a ministerial act entailing the certification of an existing fact.

It does not per se promote the ends of a partnership, a matter of private law. For the maintenance of an accurate record of partnerships and the attainment of that end, the law attaches penal sanctions for any default in making timely returns (s.61) and for making any false statements (s.63). Evidently, the legislature extended the arm of the criminal law to reinforce the efficacy of the provisions of the Partnership Law affecting registration.

The rights of the partners are, subject to any agreement concluded between them, regulated by the Partnership Law itself (s.66). Other provisions of the Partnership Law regulate their obligations to the partnership, as well as their obligations as partners to third parties (see, inter alia, ss. 26, 70, 31, 17). Also the law makes provision for the rights of persons dealing with a partnership (s.38). More significantly, the Partnership Law contains comprehensive provisions for the dissolution of a partnership by the Court, including its dissolution whenever it is just and equitable (s.37). The Court vested with competence to adjudicate upon such an application, and any other matter relevant to the existence of a partnership, and the rights and obligations of a partner is, as provided in s.2, the District Court. A partnership, it must be appreciated, is the offspring of contract, that is, the product of the concurrence of the will of two or more persons to transact business in common. It is par excellence a matter of private law, affecting the property rights and obligations of the contracting parties.

The registration of a partnership leaves unaffected the rights

and obligations of the parties. It produces no noticeable legal consequences. The decision of the Registrar to register a partnership is not amenable to judicial review under article 146.1 of the Constitution. Not only a decision under s.56(1) of the Partnership Law, Cap. 116, lacks executory character but, furthermore, it is
5 one wholly incidental to a decision affecting private law rights.

The analogy drawn by the learned President with decisions of the Registrar involving the registration of trade marks is, with respect, wholly inappropriate. The registration of a trade mark is not, nor does it presuppose, the agreement of any two or more
10 parties. The registration of a trade mark is in no way dependent on the agreement of any two or more parties. What it involves is the signification of the will of the Administration in an area affecting trading public and the symbols and emblems that traders may
15 legitimately adopt for the portrayal of their products. There is, with respect, no analogy between registration of a partnership and registration of a trade mark.

The anonymous public is directly affected by decisions of the Registrar of Trade Marks and has a corresponding interest in the sustenance of the purity of the register. The interest, on the other
20 hand, of third parties in the existence of a partnership, is limited to those who trade or contemplate trading with the partnership. The classification of the registration of a partnership can appropriately be compared to the registration of mortgages under the
25 Company Law. In *Hellenic Bank v. Republic** it was decided that the refusal of the Registrar of Companies to register a mortgage under Part III of the Companies Law, Cap. 113, was non justiciable because the register and its keeping were matters primarily affecting private law rights and as such cognizable by a competent
30 civil court. Relevant also is the decision in *York Inter-national Securities Ltd. v. Republic*** where it was decided that a decision of the Registrar of Companies under s.159 of the Companies Law, Cap. 113, involving the appointment of inspectors to

* (1966) 3 C.L.R. 481.

** (1987) 3 C.L.R. 834.

investigate the affairs of a company is not justiciable under article 146.1 because it is wholly incidental to the protection of private law rights and the extent of the penal provisions of the law associated with the management of the affairs of the company. Two other decisions cited by counsel, namely, *Ieropoulos v. District Lands Officer Limassol** and *Westpark Limited v. Republic*** also throw light on the charting of the domain of public and private law. 5

The principles relevant to identifying the two domains were the subject of extensive discussion by the Full Bench in *Mahlouzarides v. Republic**** We shall not debate those principles anew, save to stress that a substantive criterion is applied to determine the domain of the law into which particular action of the Administration belongs, revolving on the purpose it is intended to promote and the degree to which it is subordinate to the dominant purpose. 10
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We conclude by deciding that the sub judice decision is neither executory nor one cognizable in the domain of public law. Therefore, the appeals will be allowed and the recourse dismissed.

Appeals allowed.

* (1987) 3 C.L.R. 830.

** (1987) 3 C.L.R. 1473.

*** (1985) 3 C.L.R. 2342; see, also, *Antoniou and Others v. Republic* (1984) 3 C.L.R. 623).