1988 April 15

[A. LOIZOU, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

STRAKKA LTD.,

Applicants,

v.

1.THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTER OF INTERIOR AND
THE DISTRICT OFFICER NICOSIA,
2. THE IMPROVEMENT BOARD OF KATO DEFTERA,
THROUGH ITS CHAIRMAN,

Respondents.

(Case No. 163/86).

Abatement of recourse for annulment—Deprivation of recourse from its subject—matter coupled with absence of damage or detriment stemming directly from the sub judice act when in operation—Burden of proving such damage or detriment—Lies on applicant—Damage or detriment from a source other than that above referred to insufficient to save the recourse—Granting of building permit pending recourse against refusal to grant such a permit—Building already erected at time of refusal—Recourse abated.

Revisional Jurisdiction—Court has no power to make academic pronouncements.

Revisional Jurisdiction—Practice—Recourse for annulment—Parties—Refusal to grant building permit made by District Officer as Chairman of an Improvement board—Republic wrongly joined as respondent.

Revisional Jurisdiction—Practice—Recourse for annulment—Opposition, failure to file—Court should still examine the validity of the sub judice act.

The District Officer of Nicosia, acting in his capacity as Chairman of the

Improvement Board of Kato Deftera, refused applicants' application for erection of a building, because applicants' plot of land originated from a partition under section 27 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 and therefore the issue of the permit offends against the provisions of section 4A of Cap.96.

It must be noted that:

(a) At the time of the said refusal the building had already been erected, and

(b) During the pendency of the recourse, section 42A was amended and, consequently, the permit applied for was granted to the applicants.

Thus the question arose whether the recourse was abated.

(c) Respondent 2 did not file an opposition, whereas respondents 1 raised a preliminary objection that as they did not issue the sub judice act, they were wrongly joined as respondents.

Held, *dismissing the recourse:* (1) Respondents 1 were wrongly joined. *(Yiaki Estates Ltd. v.The Improvement Board of Ayia Napa and Another* (1984) 3 C.L.R. 966 adopted).

(2) A recourse for annulment is abated, if it is deprived of its subject-matter and the applicant has not suffered any damage or detriment stemming from the sub judice act during its operation. The burden of satisfying the Court of such damage or detriment lies on the applicant.

(3) In this case it is obvious that by granting the permit applied for the recourse was deprived of its subject-matter, whilst, as the building had already been erected at the time of the sub judice refusal, no question of damage from the delay in granting the permit arises.

(4) The submission that the damage or detriment exists in the light of the interpretation given by the respondents to section 4A cannot be sustained. Damage or detriment in the context of a question of abatement means damage or detriment arising directly from the sub judice act and not from any other source.

(5) In the light of the above the question raised by applicants as to the constitutionality of section 4A is of an academic interest.

(6) The absence of opposition does not prevent the Court from examin-

ing the validity of the sub judice act.

Recourse dismissed.
No order as to costs.

Cases referred to:

Yiaki Estates Ltd. v. The Improvement Board of Ayia Napa and Another (1984) 3 C.L.R. 966;

Lambrou v. Republic (1970) 3 C.L.R. 75;

Irrigation Division Katzilos v. The Republic (1983) 3 C.L.R. 1068;

Malliotis and Others v. The Municipality of Nicosia (1965) 3 C.L.R. 75;

Chrysostomides v. The Greek Communal Chamber, 1964 C.L.R. 397;

Kyriakides v. The Republic, 1 R.S.C.C. 66;

Platis v. The Republic (1978) 3 C.L.R. 384;

Constantinou v. The Republic (1966) 3 C.L.R. 572;

Kontoyiannis v. The Republic (1966) 3 C.L.R. 313;

Vafeades v. The Republic (1966) 3 C.L.R. 197;

Georghiades v. The Republic (1965) 3 C.L.R. 356;

Papadopoullos v. Municipality of Nicosia (1974) 3 C.L.R. 352;

Hapeshis v. The Republic (1979) 3 C.L.R. 550;

Christodoulides v. The Republic (1978) 3 C.L.R. 189;

Lyonas v. The Republic (1975) 3 C.L.R. 536;

Malliotis v. Municipality of Nicosia (1965) 3 C.L.R. 75;

Andreou and Others v. The Republic (1975) 3 C.L.R. 108;

EPCO v. Municipality of Nicosia (1965) 3 C.L.R. 416;

Salem v. The Republic (1985) 3 C.L.R. 453;

Minister of Finance v. Public Service Commission (1968) 3 C.L.R. 691;

Lambrakis v. The Republic (1970) 3 C.L.R. 72;

Cyprus Transport Co. v. The Republic (1970) 3 C.L.R. 163;

Board for Registration of Architects e.t.c. v. Kyriakides (1966) 3 C.L.R. 640.

Recourse.

Recourse against the refusal of the respondents to issue to applicants a building permit for the construction of a building on their land at K. Deftera.

T. Papadopoulos, for the applicants.

Chr. Ioannides, for the respondent.

Cur. adv. vult.

A. LOIZOU P. read the following judgment. By means of an application dated 3rd July, 1985, the applicants applied for a building permit for the construction of a building upon their plot No. 330 sheet/plan XXX/28.W.1 at Kato Deftera.

The District Officer Nicosia by his letter of the 24th December 1985, informed the applicants that their application was refused because the said plot of land "originated from a partition under section 27 of the Immovable Property (Tenure Registration and Valuation) Law, Cap 224 and therefore the issue of the permit offends against the provisions of section 4A, of the Streets and

Buildings Regulation Law, Cap. 96".

As against the rejection of their above application for a building permit, the applicants filed the present recourse whereby they prayed for the following relief:

"(a) A declaration of the Court that the act and/or decision of the respondents which was communicated to the applicants by letter of the respondents dated the 24th December 1985, and by means of which there was refused the applicants' application for a building permit, dated the 3rd July 1985, for the construction of a building upon plot 330 sheet/plan XXX/28.W.1 at Kato Deftera, is null and void and of no legal effect whatsoever. Further or in the alternative.

(b) A declaration of the Court that the omission of the respondents to issue to the applicants a building permit on the basis of their application dated the 3rd July, 1985, is null and void and of no legal effect whatsoever and whatever has been omitted ought and should have been performed."

The recourse was mainly based on the following grounds of law:

"1. Section 4A of the Streets and Buildings Regulation Law, Cap. 96, does not, upon its true construction and application, cover the erection of a building upon a plot that had originated from a division or partition which had been effected before the coming into operation of this section, that is to say before the 8th May, 1978.

2. Section 4A of the Streets and Buildings Regulation Law, Cap. 96 is unconstitutional in its entirety or to the extent it refers to division or partition of a plot of land which has been effected before the coming into operation of this section, because it constitutes an exorbitant and unjustified and impermissible restriction of the right of property and brings about discriminatory, unfair and unequal treatment, contrary to Articles 23 and

28 of the Constitution."

Respondents 1, raised the preliminary objection that they have not issued the sub judice act or decision and therefore the recourse against them is without a subject matter.

No opposition has been filed by respondents 2.

Following the filing of a written address by learned counsel for the applicants, learned counsel for the respondents filed the following document under the heading "written address of the respondents".

"This recourse is directed against the decision of the respondent to issue a building permit in respect of plot 330 sheet/plan XXX/28.W.1 at Kato Deftera dated 3rd July, 1985.

2. I humbly submit that as a result of my written representations to the District Officer Nicosia, I received a letter from him dated the 2nd June, 1987, by means of which he informed me that 'following the recent amendments of section 4A of the Streets and Buildings Regulation Law, Cap. 96, by means of Laws 199/86 and 53/87, the ground of rejection of the application has vanished and thus the claim upon which the recourse was filed has been absolutely satisfied by the issue of a building permit on the 13th April, 1987.

3. I therefore, contend that this recourse has been rendered without a subject matter and must be dismissed."

Learned counsel for the applicants contended that the sub judice act has brought about consequences which have not been erased by the issue of the new decision. Therefore the applicants are entitled to and apply for the issue of an annulling judgment in their recourse in accordance with Article 146.1 of the Constitution. Such a course is necessary because it will enable them to institute proceedings before the appropriate Court, under Article 146.6 of the Constitution, and claim the damages they have sus-

tained during the period the sub judice act was in operation in view of the provisions of Article 172 of the Constitution.

Learned counsel for the applicants elaborating on his above contention submitted that a judicial pronouncement upon the grounds of law in support of the recourse - under paragraphs 1 and 2 above - was necessary because by the new decision of the respondents the drastic restrictions and obstacles which were imposed by means of the sub judice decision are not erased or abolished but on the contrary they remain in force and constitute serious and substantive restrictions to the use of the applicants' property. These restrictions - the submission went on - are such as to obstruct the further development and/or exploitation of the applicants' property and culminate to the manifestly unfair and illegal result which deprived the applicants of the right to use and enjoy their property. This is so because upon an area of thirteen donums, and according to the interpretation which respondents gave to section 4A of Cap. 96, the applicants are deprived of the right to erect any other building, besides the one they are now erecting and which in any case it is being erected following the amendment of section 4A.

The preliminary objection: -

Though learned counsel for the respondents has not elaborated on the preliminary objection, it would appear that it is based on the ground that the sub judice decision was not taken by respondents 1 - the Minister of Interior and the District Officer Nicosia - but by respondents 2 - the Improvement Board of Kato Deftera. If this is the case then of *Yiaki Estates Ltd., v. 1. The Improvement Board of Ayia Napa, 2. The District Officer* of Famagusta (1984) 3 C.L.R. 966 is applicable. In this case I held:

" ... that the District Officer acted solely in his capacity as Chairman of the respondent Board and he took no executory decision of his own or confirmed any decision taken by the appropriate authority; that for all intents and purposes it would be enough in the circumstances to have made the Improvement

Board of Ayia Napa as the respondent in these proceedings, the District Officer of Famagusta as such having no locus standi in his said capacity in the present proceedings; and the recourse against him has to be dismissed for that reason."

Adopting my reasoning in the *Yiaki's case* I hold that the recourse against respondents 1 must be dismissed.

I shall now proceed to deal with the merits of the recourse notwithstanding the non-filing of opposition by respondents 2 and their non appearance because a recourse for annulment such as this one, is aimed against the act or decision (or omission) which is its subject matter and not against any party as such, and the failure to file an opposition or the absence of any party from the proceedings does not prevent the Court from examining (and determining) the validity of the subject matter of the recourse. (See *Lambrou v. Republic* (1970) 3 C.L.R. 75).

In view of the issue of the building permit during the pendency of the recourse the issue that arises for consideration is this: Whether the subject matter of the recourse has disappeared and the consequences of such disappearance upon the fate of the recourse.

The relevant principles have been expounded by Stylianides J., in *Irrigation Division Katzilos v. The Republic* (1983) 3 C.L.R. 1068, at pp. 1080-1083 as follows:

"Counsel for the respondent argued that the subject matter of this recourse ceased to exist by the later act of the grant to the interested party of the permit under the Water Supply (Special Measures) Law of 1964 (Law No.32 of 1964) and consequently the act challenged lost its executory nature.

A recourse may be abated as a result of events which take place subsequent to the filing and before the conclusion of the hearing of such recourse. In general a recourse cannot continue when its subject-matter has ceased to exist *(Christos Mallio-*

tis and Others v. The Municipality of Nicosia (1965) 3 C.L.R. 75).

Article 146, paragraph 2, of the Constitution provides that "a recourse may be made by a person whose any existing legitimate interest, ... is adversely and directly affected". Existence of interest of an applicant is a condition precedent of the annulment jurisdiction of an administrative Court. A recourse for annulment is not an actio popularis; it requires in respect of the applicant a legitimatio causum. The required interest of the applicant must subsist on the date of the hearing of the recourse as well *(Kyriacos Chrysostomides v. The Greek Communal Chamber,* 1964 C.L.R. 397, 402).

When the subject-matter of a recourse ceases to exist and the continuation of a recourse serves no purpose, the recourse is abated. It is abated when the sub judice act is revoked expressly or by implication. (Jurisprudence of the Council of State in Greece, 1929-1959, p. 275). The aim of a recourse is the annulment of an administrative act and the erasing of all its consequences, or the legal results that it produced. Therefore, if the applicant did suffer a detriment whilst the administrative act was still operative, and before it ceased to exist the recourse is not abated.

Under Article 146.6 of the Constitution a person is only entitled to seek compensation after he obtains a judgment in annulment proceedings before the administrative Court. Therefore, if he suffered any damages from the sub judice administrative act, though it ceased to exist after the filing of the recourse, he is entitled to have the recourse determined as a judgment of this Court under paragraph (4) of Art. 146 is a sine qua non to a claim for damages before a Civil Court, under Art. 146.6 before the appropriate Court. (Kyriakides v. The Republic 1 R.S.C.C. 66, 74).

In Greece the position is lucidly stated in Tsatsos - Application for Annulment, 3rd edition, p. 372, as follows: -

' Εάν η ζημιογόνος πράξις της διοικήσεως δεν ανακληθή, αλλά καταργηθή, ή ανακληθή, αλλ' ουχί πλήρως, δηλαδή εξ υπαρχής, αλλ' από τινος χρονικού σημείου μεταγενεστέρου της εκδόσεως της προσβαλλομένης πράξεως, εξεταστέον αποβαίνει, εάν εκ της ισχύος αυτής από του χρόνου της εκδόσεως μέχρι της τοιαύτης ανακλήσεως παρήχθησαν αποτελέσματα ζημιούντα τον προσφυγόντα και δεκτικά πλέον ανατροπής μόνον δι' ακυρώσεως. Εις ην περίπτωσιν παρήχθησαν τοιαύτα εκ της προσβαλλομένης πράξεως αποτελέσματα, η αίτησις ακυρώσεως, παρά την από χρονικού σημείου εφ' εξής μόνον επενεργούσαν ανακλητικήν πράξιν, δεν αποστερείται του αντικειμένου της. Εις ην περίπτωσιν όμως δεν παρήχθησαν τοιαύτα εκ της προσβαλλομένης πράξεως αποτελέσματα, τουλάχιστον ως προς τον αιτούντα ή παρήχθησαν ως προς αυτόν αλλά μετά το χρονικόν σημείον, αφ' ου η ανάκλησις ενεργεί, η περί ακυρώσεως αίτησις αποβαίνει άνευ αντικειμένου'.

('If the injurious act of the administration is not revoked, but is cancelled, or revoked, but not completely, that is from the beginning, but from a certain period of time subsequent to the issue of the attacked act, it should be examined, if from its validity from the time of its issue until such revocation were produced results injurious to the applicant and amenable only to annulment. In the case where such results have been produced by the attacked act, the application for annulment in spite of the from a certain time limit and thereafter influencing revocative act, it is not deprived of its object. But in the case where no such results have been produced by the attacked act, at least in respect of applicant or have been produced in respect of someone else but after the time limit, when the revocation operates, the application for annulment becomes without object)'.

Spiliotopoulos in the Manual of Administrative Law, 2nd edition, p. 454 stated: -

505. Η δίκη καταργείται (ΝΔ 170/1973 άρθρον 32),

πλην της περιπτώσεως ελλείψεως υποκειμένου και λόγω ελλείψεως αντικειμένου εις τας ακολούθους περιπτώσεις: (ι) .... (ιι) .... (ιιι) ανακλήσεως της διοικητικής πράξεως εν τω συνόλω της μετά την κατάθεσιν της αιτήσεως ακυρώσεως ή της προσφυγής, ρητής (ΣΕ 3570/1978), (iv) .... (v) αντικαταστάσεως ή τροποποιήσεως της προσβληθείσης διοικητικής πράξεως μετά την κατάθεσιν της Αιτήσεως Ακυρώσεως (Σ. Ε. 2349/1978) (vi) λήξεως της ισχύος της διοικητικής πράξεως χωρίς να παραμένουν διοικητικής φύσεως συνέπειαι (ΣΕ 3958/1978) ....'.

('505. The trial is dismissed (Law 170/1973 section 32), except in the case of lack of subject and due to lack of object in the following circumstances: (i) ....., (ii) ....., (iii) ..... revocation of the administrative act in whole after the filing of the application for annulment or the recourse, express (C.S. 3201/1978) or implied, resulting from the act of the same organ and regulating the same matter (C.S. 3570/1978), (iv) ..., (v) replacement or amendment of the attacked administrative act after the filing of the application for annulment (C.S. 2349/1978), (vi) expiry of the validity of the administrative act without there remaining results of an administrative nature').

In the present case the sub judice decision ceased to exist and the legal position is governed by the act of 17th September, 1982 - the issue of the permit under the Water Supply (Special Measurers) Law of 1964, as aforesaid. No damage or detriment, was caused by the act challenged before it ceased to be operative."

(See also, *Platis v. The Republic* (1978) 3 C.L.R. 384; *Constantinou v. The Republic* (1966) 3 C.L.R. 572; *Kontoyiannis v. The Republic* (1966) 3 C.L.R. 313; *Vafeades v. The Republic* (1966) 3 C.L.R. 197; *Chrysostomides v. The Republic*, 1964 C.L.R. 397; *Georghiades v. The Republic* (1965) 3 C.L.R. 356; *Papadopoullos v. Municipality Nicosia* (1974) 3 C.L.R. 352; *Hapeshis v. The Republic* (1979) 3 C.L.R. 550; *Christodoulides v. The Republic* (1978) 3 C.L.R. 189 and 193; *Lyonas v. The*

Republic (1975) 3 C.L.R. 536; *Malliotis v. Municipality Nicosia* (1965) 3 C.L.R. 75; *Andreou and Others v. The Republic* (1975) 3 C.L.R. 108; *EPCO v. Municipality Nicosia* (1965) 3 C.L.R. 416; *Salem v. The Republic* (1985) 3 C.L.R. 453.

In the *EPCO* case, supra, same as in this case, applicants were complaining against "the refusal, or omission, of the Municipal Authorities in Nicosia town to grant them a building permit".

During the pendency of the recourse against the refusal or omission in question, the said permit was granted. Triantafyllides J., as he then was, dealt with the matter as follows at pp. 421-422:

"The said permit was subsequently issued to Applicants in September, 1962. So any omission that existed until then ceased in September, 1962.

What remains to be examined is whether or not the issuing of such permit nearly a year after the application had been made for it has cured whatever omission had existed in the matter, thus depriving this recourse of its subject-matter, with the consequence that the proceedings are abated. No doubt a recourse cannot continue when its subject-matter has ceased to exist (Malliotis and The Municipality of Nicosia reported in this Part at p. 75 ante).

When an omission is being complained of in a recourse and what has been omitted is performed later, the recourse becomes abated, as being deprived of its subject-matter, unless it is shown that what has been done belatedly is not so useful to the party making the recourse as it would have been had it been done at the appropriate time earlier. (Vide Kyriakopoulos on Greek Administrative Law, 4th edition vol. III p. 146 and Tsatsos on Recourse for Annulment, 2nd edition at p. 241).

In this Case it has been alleged by counsel for Applicants that Applicants were prejudiced by the delay to grant the permit

but no concrete proof of such prejudice has been adduced; on the contrary it is not disputed that the permit, even when granted, was allowed to lapse, by the passage of a year from the issue thereof, and then when renewed it was again allowed to lapse, without any building being undertaken during all this time. Thereafter no application for its renewal was made again until the matter came up before the Court in January, 1965.

In all the circumstances of this Case I have come to the conclusion that the admittedly belated issue, in September, 1962, of the building permit to Applicants should be taken as amounting to a cure of the previous omission of Respondent in the matter and that, therefore, this recourse has been rendered without a subject- matter and has conseqently been abated. It is dismissed accordingly for this reason."

In the *Malliotis case*, (supra), Triantafyllides J., as he then was, said the following at pp. 94-95:

"Having come to the conclusion that the sub judice scheme has ceased to exist, I am of the opinion that this recourse cannot continue against such scheme because these proceedings have been consequently abated.

It is well settled that a recourse cannot continue when its subject-matter has ceased to exist. (See Conclusions from the Jurisprudence of the Council of State in Grece 1929-1959 p. 275 as well as Chrysostomides and the Greek Communal Chamber, 1964 C.L.R. 397).

It might be observed at this stage that we are not concerned in this Case with an administrative act of limited duration which, before ceasing to have effect, has produced already permanent and continuing results. If that were so, then depending on the exact circumstances, the recourse could possibly have proceeded, irrespective of the determination of the effect of the act. In the motion for relief, however, Applicants object against an act the results of which would materialize

only if the objection were to be rejected and Applicants had to apply for a building permit, with the consequences provided for by section 13 of Cap. 96. As the said act has ceased to exist before any such results have been produced, not only has the subject-matter of the recourse disappeared but, also, no legitimate interest of Applicants is being affected."

In considering the issue of abatement of this recourse and the correlated issue of whether applicant has suffered any detriment whilst the sub judice act was still operative we must bear in mind that the building which constituted the subject matter of the building permit which was applied for and refused had been constructed before the sub judice refusal or omission. (See para 7 of the opposition).

It is clear from the above case law (a) that a recourse cannot continue when its subject matter has ceased to exist and (b) that in such a case an applicant is entitled to have the recourse determined if he has suffered any damage or detriment from the sub judice act during the operation thereof. Having regard to the fact that a building permit was granted to applicants during the pendency of the recourse and to the fact that the subject matter of the recourse was the refusal or omission to grant such a building permit, I am driven to the conclusion that the subject matter of the recourse has disappeared or ceased to exist and the recourse must for this reason be treated as having been abated.

Regarding applicants' submission for pronouncement on the merits of the recourse applicants have to satisfy prerequisite (b) above namely that they have suffered damage or detriment from the sub judice act during the operation thereof. It is clear from the EPCO case (supra), that the burden of satisfying such a prerequisite rests on the applicants. As already stated the building in question had been erected before the sub judice refusal. So no question of detriment, prejudice or damage arises because of the belated issue of the permit. Applicants' submission on the question of detriment concerns the correct interpretation and constitutionality of section 4A of Cap. 96 because they contend that the

interpretation that was given to it by applicants prevents them from further developing or exploiting their land.

To the above submission of learned counsel I have this to say:

A recourse for annulment, such as the one in this case, is aimed against the act or decision which is its subject matter; and what is primarily before the Court is the decision subject matter of the recourse and its validity (See *Minister of Finance v. Public Service Commission* (1968) 3 C.L.R. 691; *Lambrou v. The Republic* (1970) 3 C.L.R. 75; *Lambrakis v. The Republic* (1970) 3 C.L.R. 72; *Cyprus Transport Co., v. The Republic* (1970) 3 C.L.R. 163).

In this case what is before the Court is the validity of the decision of the respondents whereby they refused to grant a building permit to the respondents and the grounds upon which the sub judice decision was based, namely the interpretation of section 4A of Cap. 96, etc. , are of Secondary importance and do not affect at all the question of the existence of detriment, damage or prejudice.

When we speak of damage, detriment, or prejudice in this context we must confine it to damage arising solely and directly from the sub judice act itself and not from any other source. In other words the cause and source of the damage must be the sub judice act and not causes or sources incidental to the sub judice act such as the grounds upon which it was founded. Therefore applicants have not suffered any damage, detriment or prejudice during the operation of the sub judice act and are, thus, not entitled to a determination of the recourse. If in future applicants are prevented by the administration on any ground, including the grounds of interpretation and constitutionality of the said section 4A of Cap. 96, from further developing or exploiting their land the road is open for them to challenge the relevant decision of the administration by means of a recourse.

I would further, add that since the subject matter of the re-

course has ceased to exist and since I have been invited by applicants to pronounce on the correct interpretation and constitutionality of the said section 4A of Cap. 96. this is tantamount to being invited to determine abstract questions. But as was held in the *Board for Registration of Architects etc. v. Kyriakides* (1966) 3 C.L.R. 640, at p. 655 "the judicial power does not extend to the determination of abstract questions; and it is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case". It is clear from all the above that the questions the determination of which is sought by the applicants are not necessary to a decision of the case.

For all the above reasons the recourse has been abated and must be dismissed. There would be no order as to costs.

Recourse abated and dismissed.
No order as to costs.