IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

IOANNIS IOSIF,

Applicant,

and

THE CYPRUS TELECOMMUNICATIONS AUTHORITY,

Respondent.

(*Case No.* 17/68).

Public Bodies—Officers of—Cyprus Telecommunications Authority (CYTA) — Permanent appointments to the post of Clerks-Supervisors—Made by the Board of the Respondent Authority in November 1967, *viz. after the enactment on June* 30, 1967 *of the Public Service Law* 1967*—After the promulgation of which Law, the Public Service Commission, set up under Article* 124 *of the Constitution and empowered under Article* 125 *to make appointments,* inter alia, *of officers and servants of the Respondent Authority, ceased to exist—And the Public Service Commission created by the aforesaid Law has no power to make such appointments—No legislation in force at the material time (November,* 1967) *enabling the Respondent Authority to make the* sub judice *appointments—Section* 10(1) *of the Telecommunications Service Law, Cap.* 302 (*as amended by Law No.* 25 *of* 1963, *section* 4) *inapplicable to the present case—Nor are the* sub judice *appointments warranted by the doctrine of necessity—* Sub judice *appointments annulled as made in an invalid manner.*

Necessity—Doctrine of—Necessary prerequisites for the coming into play of this doctrine—Circumstances and manner justifying resort to the said doctrine, especially for the purpose of taking administrative measures in relation to personnel matters.

Ex post facto *validation by statute of otherwise void appointments—The Public Bodies (Regulation of Personnel Matters) Law,* 1970 (*Law No.* 61 *of* 1970), *section* 4*—Does not apply to the case of* sub judice *appointments, as the present ones in relation to which judgment had already been reserved at the time when such validating legislation was enacted.*

In this case the Applicant complains against the permanent appointments (by way of promotion) of the Interested Parties Messrs. D. Ph. and A. Th. as Clerks—Supervisors in the Accounts Department of the Respondent Corporation viz. the Cyprus Telecommunications Authority (CYTA). The said appointments were made on November 17, 1967 by the Board of the Respondent.

It was argued on behalf of the Applicant that the appointments in question were *null* and *void*, on the very simple ground that at the time (viz. November, 1967) no legislation at all was in existence enabling the Respondent to make them as it has done. The submission was accepted by the Court and the appointments complained of were accordingly annulled. The position may be summarized as follows:

By virtue of Article 125 of the Constitution, read together with Article 122, the Public Service Commission, set up under Article 124, was the competent organ to make appointments and promotions in relation, *inter alia*, to the staff of the Respondent (CYTA) (*supra*). But in the case *Bagdassarian and The Electricity Authority of Cyprus* (1968) 3 C.L.R. 736, it was held: (1) that after the promulgation on the 30th of June, 1967, of the Public Service Law 1967 (Law No. 33 of 1967) there ceased to exist a Public Service Commission competent, under Article 125 of the Constitution, to make, *inter alia*, appointments or promotions of officers or servants in the service of the Respondent; and (2) that the Public Service Commission set up and functioning under the aforesaid Law 33 of 1967 was not the organ empowered to make the *sub judice* appointments, as it is an organ created by that Law and possessing only the powers laid down therein—within the ambit of which are not included matters concerning the staff of the Respondent.

That being the position with regard to the Public Service Commission, it was contended by counsel for the Respondent that: (1) there were still statutory powers, namely section 10(1) of the relevant Law (*infra*) under which the Respondent Authority could validly make the *sub judice* appointments; (2) alternatively, the Respondent was entitled to act as it did in the matter of the aforesaid appointments by virtue of the doctrine of necessity. Rejecting both submissions made by counsel for the Respondent and annulling the appointments complained of, the Court:

Held, (1). The relevant legislative provision invoked by counsel for the Respondent Authority is section 10(1) of the Telecommunications Service Law, Cap. 302, as replaced by section 4 of the Telecommunications Service (Amendment) Law 1963 (Law No. 25 of 1963). Originally section 10(1) provided: "The Authority shall appoint a General Manager.... and such other officers and servants as may be necessary for the purposes of this Law". As replaced in 1963 (*supra*) section 10(1) now reads as follows:

"There shall be appointed a General Manager..... and such other officers and servants of the Authority as may be necessary for the purposes of this Law."

It is clear that, as at the time when the aforesaid amending Law No. 25 of 1963 was enacted on May 16, 1963, there was in existence and functioning a Public Service Commission exercising under Article 125 of the Constitution, exclusively, powers regarding, *inter alia*, the appointments of the officers and servants of the Respondent Authority. It was envisaged that the relevant appointments referred to in the amended section 10(1) would be made by the Commission, and not by the Respondent Authority.

(2) So, in fact, there was not in existence any legislation at all, in November 1967 (*supra*) enabling the Respondent to make the *sub judice* appointments.

(3) Regarding the argument based on the doctrine of necessity I am of the opinion that such doctrine is not applicable to the present case. Even if one were to regard as a situation caused by exceptional circumstances the non-existence (after the enactment on June 30, 1967 of the Public Service Law 1967) of a Public Service Commission empowered to act under Article 125 of the Constitution as the appointing Authority in relation to the staff of the Respondent, the obvious remedy which ought first to have been urgently resorted to, was to draw the attention of the appropriate authorities of the Republic to the need to remedy the situation in such a manner as they would deem best and in the meantime to take no steps other than measures of a temporary character, limited to the duration of the situation brought about by the exceptional circumstances and proportionate thereto (see *The Attorney-General* v. *Ibrahim,* 1964 C.L.R. 195; see also, *Georghiades and The Republic* (1966) 3 C.L.R. 317; *HadjiGeorghiou and The Republic* (1966)

3 C.L.R. 504; *Papapantelis and The Republic* (1966) 3 C.L.R. 515; See also in this respect the Annual Survey of Commonwealth Law, 1966 at p. 89).

(4) After judgment in this case had been reserved there was promulgated the Public Bodies (Regulation of Personnel Matters) Law, 1970 (Law No. 61 of 1970) for the purpose of enabling the Respondent, among other public bodies, to decide on appointments and other related matters affecting personnel; by section 4 of that Law it is laid down that, *inter alia*, appointments already made prior to the enactment on June 12, 1970 of the said same Law shall be deemed as having been made under its provisions.

But this *ex post facto* validation of otherwise void appointments cannot apply to, or affect, appointments like the *sub judice* ones, which at the time of the enactment of the said Law were the subject-matter of a recourse in relation to which judgment of this Court had been reserved (see *Cleanthis Georghiades and The Republic* (1966) 3 C.L.R. 252).

Sub judice appointments annulled; order for £30 towards Applicant's costs.

Cases referred to:

Cleanthis Georghiades and The Republic (1966) 3 C.L.R. 252;

Georghiades and The Republic (1966) 3 C.L.R. 317;

HadjiGeorghiou and The Republic (1966) 3 C.L.R. 504;

Papapantelis and The Republic (1966) 3 C.L.R. 515;

The Attorney-General v. *Ibrahim,* 1964 C.L.R. 195;

Bagdassarian and The Electricity Authority of Cyprus (1968) 3 C.L.R. 736.

Recourse.

Recourse against the decision of the Respondent to appoint the two Interested Parties to the post of Clerks—Supervisors in the Accounts Department of the Cyprus Telecommunications Authority.

L. Papaphilippou, for the Applicant.

A. Hadjioannou, for the Respondent.

Cur. adv. vult.

The following judgment was delivered by:

TRIANTAFYLLIDES, J.: In this case the Applicant complains against the appointments of the Interested Parties, D. Phiniotis and A. Theocharides, as Clerks-Supervisors in the Accounts Department of the Respondent.

Such appointments, which were made by way of promotions, were decided upon by the Board of the Respondent on the 17th November, 1967 (see the relevant minutes *exhibit* 3).

An interim decision given by me in a related case—with which the present case was heard together on common iusues—was adopted, *mutatis mutandis*, as an interim decision for the purposes of this case, too.

By such decision (see *Bagdassarian* and *The Electricity Authority of Cyprus* (1968) 3 C.L.R. 736) it was held that the Public Service Commission set up and functioning under the Public Service Law, 1967 (Law 33/67) was not the organ empowered to make the *sub judice* appointments, as it is an organ created by the said Law and possessing only the powers laid down therein—within the ambit of which are not included matters concerning the staff of the Respondent; and it was, further, held by that decision that after the promulgation of Law 33/67 there ceased to exist a Public Service Commission competent, under Article 125 of the Constitution, to make, *inter alia*, appointments or promotions in relation to the staff of the Respondent.

Then, this case was heard on other issues arising herein including the issue as to whether the Respondent, acting through its Board, was competent, at the material time, to make the appointments of the Interested Parties.

In this respect the following two main contentions appear to have been relied upon by counsel for the Respondent, in the light of the non-existence of a Public Service Commission competent to act under the said Article 125.

Firstly, that the Respondent was entitled to take action, regarding the appointments in question, by virtue of the doctrine of necessity; and, secondly, that the Respondent made the said appointments in the exercise of statutory powers to be found in the legislation providing for the existence and functioning of the Respondent.

It is convenient to deal, first, with the latter contention:-

The relevant legislation is the Telecommunications Service Law (Cap. 302), and particularly section 10(1) thereof.

The said provision originally read as follows:

> " The Authority shall appoint a General Manager, a Secretary, and such other officers and servants as may be necessary for the purposes of this Law".

By means of section 4 of the Telecommunications Service (Amendment) Law, 1963 (Law 25/63), for this provision the following one was substituted as section 10(1) of Cap. 302:-

> " There shall be appointed a General Manager, a Secretary and such other officers and servants of the Authority as may be necessary for the purposes of this Law".

It is clear that, as at the time of the promulgation of Law 25/63, on the 16th May, 1963, there was in existence and functioning a Public Service Commission exercising, under Article 125, exclusively, powers regarding, *inter alia*, the appointments of the officers and servants of the Respondent, it was envisaged that the relevant appointments would be made by the Commission, and not by the Respondent.

So, in fact, there was not in existence any legislation at all, in November, 1967, enabling the Respondent to make the *sub judice* appointments, as it has done.

I shall deal, next, with the question as to whether, by virtue of the doctrine of necessity, the Respondent, through its Board, could have made the said appointments (by either acting as the appointing authority for the purposes of section 10(1) of the relevant legislation, as amended by Law 25/63, or, even, independently of it, for the sake of ensuring the carrying on of the functions of the Respondent, in the public interest).

A necessity which would go so far as to give legal validity to the relevant action taken by the Respondent in the present instance ought to have amounted to a situation caused by exceptional circumstances which could not be otherwise dealt with (see *The Attorney-General* v. *Ibrahim*, 1964 C.L.R. 195); and on the present occasion, even if one were to regard as a situation caused by exceptional circumstances the non-existence, after the promulgation of Law 33/67, of a Public Service

Commission empowered to act under Article 125 as the appointing authority in relation to the staff of the Respondent, the obvious remedy, which ought first to have been urgently resorted to, was to draw the attention of the appropriate authorities of the Republic to the need to remedy the situation in such manner as they would deem best and in the meantime to take no steps other than measures of a temporary character, limited to the duration of the situation brought about by the exceptional circumstances and proportionate thereto (see the *Ibrahim* case, *supra*).

Subsequently to the *Ibrahim* case it was stressed in *Georghiades* and *The Republic* (1966) 3 C.L.R. 317, *Hadji-Georghiou* and *The Republic* (1966) 3 C.L.R. 504 and *Papapantelis* and *The Republic* (1966) 3 C.L.R. 515 that the doctrine of necessity could not be validly resorted to for the purpose of taking administrative measures, in relation to personnel matters, which are of permanent or radical effect, and not merely of such temporary nature as may be required to meet, for the time being, the needs of the immediate necessity (see, also, in this respect, the Annual Survey of Commonwealth Law, 1966, at p. 89).

In particular, in the *Papapantelis* case (*supra*), in which permanent promotions, which had been made without proper constitution of the appointing organ, were stated, in argument, to have been validly made by virtue of the doctrine of necessity, the following were said in the judgment (at pp. 518–519):-

> "..... that the existence of the prerequisites for the coming into play of the 'law of necessity' ought to have been established by reference to the specific circumstances in which the relevant executive action was taken; and on the material before me I am not satisfied that such prerequisites did exist in relation to the decision to promote the Interested Parties.
>
> I do fail to see how the 'law of necessity' could have warranted the making of permanent promotions to the existing, at the time, vacancies in the post of Assistant Labour Officer; any urgent needs of the service could have been met by temporary acting appointments and that is all that, in my view, could have been justified in the circumstances under the 'law of necessity' ....."

Likewise in the circumstances of the present case I am not

satisfied that the doctrine (or law) of necessity could have warranted the decision to promote the two Interested Parties to Clerks–Supervisors on a permanent basis, and not only on a temporary basis—if at all.

As a matter of fact the matter of such promotions was never actually considered, by the Board of the Respondent, for the purpose of deciding whether, notwithstanding otherwise the absence of competence to make the promotions, they could validly be made because of the existence, and extent, of a situation of necessity, and whether such necessity justified their being made on a permanent basis. This is quite clear from the relevant material which has been produced during the hearing of this case:-

On being informed—rightly in my view—by the Public Service Commission which was set up under Law 33/67 that it was not going to take action in relation to personnel matters of the Respondent (see the letter of the 7th July, 1967, which is part of *exhibit* 10), and after having been legally advised that, since the enactment of the said Law, the Respondent was the only competent organ for purposes of, *inter alia*, promotions of members of its staff (see the minutes of the 18th August, 1967, which are, also, part of *exhibit* 10), the Board of the Respondent proceeded to promote, on the 18th August, 1967, to Assistant Accounting Officers three Clerks–Supervisors in the Accounts Department of the Respondent in Nicosia.

Then, to two of the vacancies thus created (see the evidence of Mr. Markides, the Personnel Officer of the Respondent) there were promoted, on the 17th November, 1967, by way of permanent appointments, the two Interested Parties; the third vacancy having been filled not by way of promotion but by means of a transfer of a Clerk–Supervisor from Famagusta, who had become redundant there.

From the minutes of the Board of the Respondent of the 17th November, 1967 (see *exhibit* 3) it is quite clear that such Board acted as if it were normally the competent appointing authority; there is nothing mentioned therein to the effect that it decided to exercise competence, in promoting the two Interested Parties, by virtue of the doctrine of necessity; nor is there anything to show that consideration was given to the question as to whether it was imperative, in order to ensure

the continuance of the proper functioning of the Respondent, to promote them on a permanent basis or only on a temporary basis—if at all.

Moreover, the oral evidence called by the Respondent and the other material produced on its behalf before the Court fall far short of establishing that it was a matter of imperative necessity to promote the two Interested Parties to Clerks–Supervisors on a permanent basis.

In all the circumstances of this case, and in the light of the law applicable, I have no difficulty in holding that in making the two *sub judice* promotions, as it has made them, the Respondent acted in an invalid manner and, thus, they have to be declared to be *null* and *void* and of no effect whatsoever.

In view of this it is not necessary to pronounce upon any other issue which has been raised regarding the validity of such promotions.

Before concluding I should refer to the fact that on the 12th June, 1970, long after judgment in this case had been reserved, there was promulgated the Public Bodies (Regulation of Personnel Matters) Law, 1970, (Law 61/70) for the purpose of enabling the Respondent, among others, to decide on appointments and other related matters affecting personnel; its preamble is eloquent enough indication of the lack of competence till then, on the part of the Respondent, to decide on such matters.

I have referred to this Law not because it is necessary in this judgment to deal in any way with its effect in general—and I am leaving this question entirely open—but because by means of section 4 of such Law it is laid down that, *inter alia*, appointments already made prior to its coming into effect shall be deemed as having been made on the basis of its provisions.

This section 4 is quite similar, regarding its object and other essential characteristics, to section 5 of the Public Service Commission (Temporary Provisions) Law, 1965 (Law 72/65). On the basis of the reasoning in *Cl. Georghiades* and *The Republic* (1966) 3 C.L.R. 252, by which section 5 of Law 72/65 was found to be inapplicable to the case of a *sub judice* appointment in relation to which judgment had been reserved,

I have no difficulty in concluding that section 4 of Law 61/70 cannot apply in the present case so as to render valid the *sub judice* promotions.

In the result the recourse succeeds and the said promotions are annulled. The Respondent to pay to the Applicant £30 towards costs.

Sub judice decision annulled.
Order for costs as above.