

1984 March 31

[TRIANAFYLLIDES, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PANAYIOTIS TSINGI,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTER OF INTERIOR,

Respondent.

(Case No. 344/82).

Practice—Recourse for annulment—Treated as abandoned and dismissed due to failure of applicant to comply with direction regarding filing of written address—Re-instatement—Inherent jurisdiction of the Court to reinstate and competence under rule 19 of the Supreme Constitutional Court Rules of Court and Order 26 rule 14 of the Civil Procedure Rules—Since recourse never actually abandoned it has to be determined in accordance with Article 146.A of the Constitution—And for this to be done it has to be reinstated. 5

Practice—Recourse for annulment—Rules of Civil Procedure—Extent of application of, to proceedings in a recourse—Rule 18 of the Supreme Constitutional Court Rules of Court. 10

Following the failure of counsel for the applicant to comply with the direction of the Court regarding the filing of his written address an order was made by the Court stating that the case was treated as abandoned and was dismissed accordingly. 15

Upon an application for the reinstatement of the case it was contended by Counsel for the applicant that the written address was not filed by him through an oversight; and that the case has not been abandoned. Regarding the power of the Court to reinstate this case Counsel referred to rule 18* of the Supreme Constitutional Court Rules. 20

* Rule 18 provides that the Civil Procedure Rules shall apply mutatis mutandis to all proceedings before the Supreme Constitutional Court.

On the application for reinstatement:

Held, that the reference to the Civil Procedure Rules in rule 18 of the Supreme Constitutional Court Rules must be construed on the basis that rules of Civil Procedure, the application of which is excluded due to the nature of the judicial control which is exercised by means of a recourse for annulment, are not applicable to the proceedings in respect of such a recourse; that unless a recourse has to be dismissed because one of the prerequisites under Article 146 entitling the applicant to file it does not, or ceases to, exist, or because it is abated due to disappearance of its subject-matter, or it is, actually, abandoned or withdrawn and it is dismissed for that reason, it can only be disposed of in the manner set out in the aforementioned paragraph 4* of Article 146; that since this recourse has never been actually abandoned it has to be determined in accordance with Article 146.4 and for this to be done it has to be reinstated, inasmuch as it was dismissed on the incorrect assumption that, due to the long delay of counsel for the applicant to file his written address, it had been abandoned; that this Court has inherent jurisdiction to reinstate this case in the present circumstances and, in any event, it possesses competence both under rule 19 of the Supreme Constitutional Court Rules and rule 14 of Order 26 of the Civil Procedure Rules to the extent to which it is applicable to a case of the present nature; accordingly the recourse is hereby reinstated.

Order accordingly.

Cases referred to:

Kyriakides v. Republic, 1 R.S.C.C. 66 at p. 69;

Cyprus Transport Co. Ltd. v. Republic (1969) 3 C.L.R. 501 at p. 502;

Lambrou v. Republic (1970) 3 C.L.R. 75 at p. 79;

Neophytou v. Republic (1977) 3 C.L.R. 140 at pp. 142, 143;

Decesion of the Council of State in Greece No. 383/73.

Application.

Application for the reinstatement of the case which has been dismissed due to the failure of applicant's counsel to file his written address in accordance with the directions of the Court.

* Article 146.4 is quoted at p. 1266 post.

N. Papaefstathiou, for the applicant.

A. Vladimirov, for the respondent.

Cur. adv. vult.

TRIANTAFYLIDIS P. read the following decision of the Court. This recourse was filed on the 24th August 1982 and on the 3rd of November 1982 it was directed that the written address of counsel for the applicant should be filed and delivered to counsel for the respondent within four weeks after the filing of the Opposition which was, eventually, filed on the 11th November 1982.

The said written address had not yet been filed when this case came up before this Court on the 2nd February 1983 and, notwithstanding a direction on that date that it should be filed within four weeks, it had not yet been filed on the 13th April 1983, when it was directed that if counsel for the applicant failed to file his written address within four weeks then this recourse would be treated as abandoned and it would be dismissed accordingly.

On the 31st May 1983 an order was made stating that as counsel for the applicant had failed to comply with the direction of the 13th April 1983, regarding the filing of his written address, this case was treated as abandoned and was dismissed accordingly.

On the 22nd June 1983 an application was filed for the reinstatement of this case, which was opposed by counsel for the respondent.

In an affidavit filed in support of the application for reinstatement, and sworn on the 22nd June 1983 by counsel appearing for the applicant, it is stated that the written address of counsel for the applicant was not filed by him through an oversight on his part.

It is clear from the direction which was made on the 13th April 1983 and the order made on the 31st May 1983 that due to the failure of counsel for the applicant to file his written address this case was treated as abandoned and was dismissed accordingly.

It appears however, from the affidavit filed in support of the application for the reinstatement of this case that it has not, in fact, been abandoned.

As regards my powers to re instate this case I have been referred
5 to rule 18 of the Supreme Constitutional Court Rules of
Court which provide that the Civil Procedure Rules shall apply
mutatis mutandis to all proceedings before the Supreme Consti-
tutional Court—(and consequently before our Supreme Court
10 when exercising the jurisdiction of the Supreme Constitutional
Court as in the present case)—so far as circumstances permit
or unless other provision has been made by the Supreme Consti-
tutional Court Rules of Court or unless the Court otherwise
directs; and in view of the above provision in the aforesaid
15 rule 18 I have been referred to rules 13 and 14 of Order 26
of the Civil Procedure Rules regarding the setting aside of a
judgment obtained by default.

As pointed out, and rightly so, by Tsatsos in the Recourse
for Annulment before the Council of State (Τσάτσου “Η Αίτηση
20 Ακυρώσεως Ενώπιον του Συμβουλίου της Επικρατείας”), 3rd
ed., p. 349, paragraph 172, rules of civil procedure, the appli-
cation of which is excluded due to the nature of the judicial
control which is exercised by means of a recourse for annul-
ment, are not applicable to the proceedings in respect of such
a recourse; and I am of the view that the reference to the Civil
25 Procedure Rules in our aforesaid rule 18 of the Supreme Consti-
tutional Court Rules must be construed on this basis.

In *Kyriakides v. The Republic*, 1 R.S.C.C. 66, the following
were stated (at p. 69):

30 “The Supreme Constitutional Court is modelled on similar
judicial institutions existing in many European countries,
and it is a Court exercising constitutional and administrative
jurisdiction.

The jurisdiction of the Supreme Constitutional Court
is laid down in the Constitution. The paramount consider-
35 ation which should weigh with this Court when exercising
its said jurisdiction is how best to serve the interests of
justice and at the same time to perform as effectively as
possible its mission under the Constitution. The basic
difference existing between the nature of the jurisdiction

of this Court and of Courts exercising civil or criminal jurisdiction makes it necessary for this Court to apply, in many instances, principles different from those applicable by other Courts in Cyprus”.

It has, also, to be observed that the powers of this Court, in dealing with a recourse such as the present one, are enumerated as follows in paragraph 4 of Article 146, which provides—

- “4. Upon such a recourse the Court may, by its decision—
- (a) confirm, either in whole or in part, such decision or act or omission; or
 - (b) declare, either in whole or in part, such decision or act to be null and void and of no effect whatsoever; or
 - (c) declare that such omission, either in whole or in part, ought not to have been made and that whatever has been omitted should have been performed”.

Thus, unless a recourse has to be dismissed because one of the prerequisites under Article 146 entitling the applicant to file it does not, or ceases to, exist, or because it is abated due to disappearance of its subject-matter, or it is, actually, abandoned or withdrawn and it is dismissed for that reason, it can only be disposed of in the manner set out in the afore-quoted paragraph 4 of Article 146.

Before proceeding any further it should be pointed out that even if a recourse has been abandoned by mistake it may be reinstated (see, in this respect, for example, the Decision of the Council of State in Greece in case 383/1973).

It has to be remembered that a recourse under Article 146.1, is primarily made against the act or decision which is its subject-matter and the parties to such recourse are merely heard in relation to the validity of such act or decision (see, inter alia, in this respect, *Cyprus Transport Co. Ltd. v. The Republic*, (1969) 3 C.L.R. 501, 502, *Lambrou v. The Republic*, (1970) 3 C.L.R. 75, 79 and *Neophytou v. The Republic*, (1977) 3 C.L.R. 140, 142, 143).

The proceedings under Article 146 are of an inquisitorial nature and the adversary element in such proceedings is only of secondary procedural importance and, therefore, an applicant

or other party to such proceedings cannot be penalized by means of an order made in case of default, as it is done, in certain circumstances, in civil proceedings.

5 As it appears from the aforementioned affidavit of counsel for the applicant that this recourse has never been actually abandoned I have to determine it in accordance with Article 146.4 and in order to do so I have to reinstate it, inasmuch as it was dismissed on the incorrect assumption that, due to the long delay of counsel for the applicant to file his written
10 address, it had been abandoned.

I have no doubt that I have inherent jurisdiction to reinstate this case in the present circumstances and, in any event, I possess competence under both rule 19 of the Supreme Constitutional Court Rules of Court and rule 14 of Order 26 of the Civil Procedure Rules, to the extent to which it is applicable to a case
15 of the present nature, to direct that my Order of the 31st May 1983 which dismissed this recourse should be set aside so that, in effect, the proceedings in it will continue as if it had never been dismissed.

20 It is to be understood, of course, that all costs of the respondent incurred as a result of the proceedings for the reinstatement of this case will have to be borne by the applicant.

Order accordingly.