

1985 July 12

[L. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

PELETICO LTD.,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTRY OF COMMERCE AND INDUSTRY,

Respondents.

(Case No. 445/81).

Recourse for annulment—Practice—Recourse against an organ, other than the one who took sub judice decision—Power of Court to amend, on its own motion, the description of the respondent in order to bring it in conformity with the true facts—A recourse is directed against the sub judice act, decision or omission. 5

Legitimate interest, Article 146.2 of the Constitution—Private company, whose objects have nothing to do with the subject-matter of the sub judice decision—Does not have legitimate interest to proceed with recourse just because the sub judice decision affects the interest of a subsidiary company. 10

Time within which to file a recourse—Article 146.3 of the Constitution—Time begins to run as from the communication of an act executory in its nature—Giving explanations in respect of such act upon request by applicants does not entail a new beginning of the time limit of Article 146.3. 15

The applicants, Peletico Ltd., are a private company, incorporated in Cyprus. Mining or quarrying business are not among the objects defined in the memorandum of association of the said company. The applicants are the holding company of Peletico Plasters Ltd., owning 80% 20

of the shares of that company, which is dealing with the mining business and mining products. Peletico Plasters Ltd. were the holders of a prospecting permit 2762 granted to them on 12.2.1976. Before the expiration of the validity of the said permit, they applied on the 12.8.1977 for the grant to them of a quarry licence for a period of twenty years in the area described as Moni LIV 32 in respect of pentonite. This application was addressed to the Council of Ministers, through the Senior Mines Officer.

In the correspondence that followed reference was made to Peletico Ltd., and also the letters were addressed to and signed by Peletico Ltd., instead of Peletico Plasters Ltd.

By letter dated 7.9.1981 the Head of the Mines Service of the Ministry of Commerce and Industry informed the applicants that the Council of Ministers dismissed their applications Nos. 4197 and 4199.

The applicants wrote a letter dated 28.9.1981 to the Mines Service of the said Ministry, expressing their regret for the refusal of application 4197 and stating that a licence had been issued to another company for a different product in approximately the same area and that no objection was raised for the grant to them of a prospecting permit as a result of which they incurred expenses. The letter ended by praying reconsideration of the case "before expiration of the 72 days provided by the law for a recourse to the Constitutional Court" (obviously meaning the 75 days provided in Article 146.3 of the Constitution).

The Mines service of the said Ministry replied to the above letter and, after referring to the history of the applications in some detail, they explained the policy of the Government with regard to pentonite and the different criteria taken into consideration in granting prospecting permits as well as the circumstances under which a quarry licence was granted to another company.

As a result of this letter the applicants on the 27.11.1981 filed the present recourse praying for a declaration that the decision of the respondents contained in their letters dated 7.9.1981 and 7.11.1981, by which the res-

pondents refused their application No. 4197 to issue them with a quarry licence for pentonite in the locality of Moni is null and void and of no effect whatsoever.

Counsel for the respondents raised the following preliminary points, namely (a) That the recourse should have been directed against the Council of Ministers which took the sub judice decision and not against the Ministry of Commerce and Industry (b) That the applicants have no legitimate interest to pursue the recourse and (c) That the sub judice decision is not executory and that the recourse is out of time.

Held, (1) As regards preliminary point (a) above, that a recourse is directed against the act, decision or omission which is its subject matter and the organ responsible for that act, decision or omission is a party to the recourse only in the sense that it is given an opportunity to be heard in relation to its outcome. The Court has power, on its own motion, at the stage of giving judgment, to amend the description of the respondent, in order to bring it into conformity with the true facts of the case. The title of the proceedings may in this respect be amended. (*Christodoulou v. The Republic*, 1 R.S.C.C. 1 followed).

(2) As regards preliminary point (b) above, that the fact that the name of the applicants appears in the correspondence and the fact that the sub judice decision was communicated to them are irrelevant. The sub judice decision did not directly affect any interest of the applicants, protected by their memorandum of association. It only affected an interest of their subsidiary Peletico Plasters Ltd., which has a separate legal entity and should have filed the recourse in its own name. The applicants have no legitimate interest to pursue this recourse.

(3) As regards preliminary point under (c) above, that with regard to the letter of the 7.9.1981 the recourse is clearly out of time since more than 75 days have elapsed until the filing of the recourse on the 27.11.1981. The letter of the 7.11.1981 does not contain any decision at all. It is simply an explanatory letter. The fact that the letter of the applicants dated 28.9.1981 requesting re-examination of the matter was written before the expira-

tion of the 75 days period as from 7.9.1981 makes no difference. Time would have begun to run from the date the applicants received the reply, had there been a re-examination of the matter and had a new decision, executory in itself, been reached. But in this case no re-examination took place and no new decision was reached.

Recourse dismissed.

No order as to costs.

Cases referred to:

- 10 *Hadjipapasymeou v. The Republic* (1984) 3 C.L.R. 1182;
Christodoulou v. The Republic, 1 R.S.C.C. 1;
Salomon v. Salomon [1897] A.C. 22;
Michaelides v. Gavrielides (1980) 1 C.L.R. 244;
15 *The Bank of Cyprus (Holdings) Ltd. v. The Republic of Cyprus, through the Commissioner of Income Tax.*
(To be reported in (1985) 3 C.L.R.).

Recourse.

Recourse against the refusal of the respondents to issue applicants with a quarry licence for pentonite in the locality of Moni for which they possessed a prospecting permit.

K. Chrysostomides, for the applicants.

A. Papasavvas, Senior Counsel of the Republic, for the respondents.

25 *Cur. adv. vult.*

L. LOIZOU J. read the following judgment. The applicants in this case pray for a declaration that the decision of the respondents contained in their letters to them dated 7th September, 1981 and 7th November, 1981, by which the respondents refused their application No. 4197 to issue them with a quarry licence for pentonite in the locality of Moni, for which they possessed a prospecting permit, is null and void and of no effect whatsoever.

35 The applicants, Peletico Ltd., are a private company incorporated in Cyprus, dealing with the manufacture and promotion of chemical, pharmaceutical, plastic and syn-

thetic products in general. It is not in any way connected with any mining or quarrying business.

The applicants are the holding company of Peletico Plasters Ltd., owning 80% of the shares of that company. Peletico Plasters Ltd. is a company dealing with the mining business and mining products. Peletico Plasters Ltd., who were the holders of prospecting permit No. 2762 granted to them on the 12th February, 1976, and valid until the 11th February, 1978, applied on the 12th August, 1977, for the grant to them of a quarry licence for a period of twenty years, in the area described as Moni LIV 32, in respect of pentonite. The said application was addressed to the Council of Ministers, through the Senior Mines Officer.

The views of various government departments were sought on the matter and the Department of Town Planning and Housing and the Cyprus Tourism Organization by their letters to the Senior Mines Officer dated 15th October, 1977 and 25th November, 1977, respectively, objected to the granting of quarry licence No. 4197. An inquiry was also conducted by the Ministry of Commerce and Industry into the work carried out by Peletico Plasters Ltd. from which it transpired that they were in possession of two quarry licences Nos. 3484 and 3675 but no work was carried out in the area under licence 3675, and the Ministry decided to leave the matter of the applications for licences with regard to pentonite pending until the government policy with regard to pentonites was formulated. This is evidenced by a letter to the applicants dated 12th September, 1979.

Perhaps it should be mentioned here that in the correspondence that followed reference was made to Peletico Ltd., and also the letters were addressed to and signed by Peletico Ltd., instead of Peletico Plasters Ltd. and that any reference to the "applicants" hereinafter made should be taken to mean "Peletico Ltd.", the company which has filed the recourse.

It seems that some time in 1980 the Ministry decided to deal with four applications including application No. 4197 submitted by Peletico Plasters Ltd. and directed

that the views of the various Government Departments be taken once again since a long time had elapsed since such views were taken. At a meeting for the above purpose, which took place on the 22nd July, 1980, the Department of Town Planning and Housing, the District Office, the Cyprus Tourism Organization and the Land Consolidation Authority objected to the granting of licence No. 4197 (appendix 1C to the Opposition).

The Senior Mines Officer prepared his report to the Director-General of the Ministry in which he set out the views of all government departments with regard to each one of the applications (appendix 1D).

As a result a submission was made by the Ministry to the Council of Ministers on the matter (appendix 1E dated 24.7.1981) suggesting the granting of licences to applications Nos. 3559 and 4198 of the applicants. Consequently the Council of Ministers decided, on the 6th August, 1981, to grant licences Nos. 3559 and 4198 to the applicants for a period of two years.

The above decision was communicated to the applicants by letter of the Head of the Mines Service of the Ministry of Commerce and Industry, dated 7th September, 1981 the relevant part of which reads as follows:

"I refer to your above applications and inform you that applications Nos. 4197 and 4199 are dismissed for touristic, town planning and other reasons.

The Council of Ministers, however, decided to approve the granting of quarry licences Nos. 3559 and 4198 for a period of two years.

.....

The applicants wrote a letter dated 28th September, 1981, to the Mines Service of the Ministry of Commerce and Industry expressing their regret for the refusal of application 4197 and stating that a licence had been issued to another company for a different mining product, in approximately the same area, and expressed their surprise how

the Cyprus Tourism Organization and the Department of Town Planning and Housing objected in their case but did not object in the case of the other company. They also referred to the fact that no objection was raised for the grant to them of a prospecting permit in the same area as a result of which they had incurred prospecting expenses. The letter ended by praying for reconsideration of the case in consultation with the Cyprus Tourism Organization and the Department of Town Planning and Housing "before the expiration of the seventy-two days provided by the Law for a recourse to the Constitutional Court" (obviously meaning the seventy-five days provided by Article 146.3 of the Constitution (appendix 1H to the Opposition). 5 10

The Mines Service of the Ministry of Commerce and Industry replied to the above letter by letter dated 7th November, 1981, (appendix 1Θ) in which after referring to the history of the four applications in some detail they explain the policy of the government with regard to pentonites and the different criteria taken into consideration in granting prospecting permits as well as the circumstances under which a quarry licence was granted to Vassiliko Cement Company Ltd., and also to the fact that the application of that company was made long before that of the applicants. 15 20

As a result of the above letter the present recourse was filed, which is based on several grounds, including wrong exercise of discretion, excess and abuse of powers, illegality, lack of due inquiry and undue reasoning. 25

Counsel for the respondents has raised several preliminary objections to the effect that the applicant has no legitimate interest to pursue the recourse, that the recourse should have been directed against the Council of Ministers which took the sub judice decision and not against the Ministry of Commerce and Industry, that the sub judice decision is not executory and that the recourse is out of time. 30 35

I propose to deal with the second objection first i.e. that the recourse is directed against the wrong party in that the Council of Ministers should have been made a respondent and not the Ministry of Commerce and Industry. 40

It is a fact that the application of Peletico Plasters Ltd., was addressed to the Council of Ministers which took the sub judge decision on the 6th August, 1981 (appendix 1 Στ to the Opposition). The letter of the Ministry of Commerce and Industry (dated 7.9.1981) is a letter communicating the above decision to the applicants. There is no doubt that the decision was taken by the Council of Ministers and not the respondent.

In this respect useful reference may be made to the case of *HadjiPapasymeou v. The Republic* (1984) 3 C.L.R. 1182, at pp. 1184-1185 where it was held by Triantafyllides, P., (following the case of *Christodoulou v. The Republic*, 1 R.S.C.C. 1), that a recourse is directed against "the act, decision or omission which is its subject-matter and the organ responsible for that act, decision or omission is a party to the recourse only in the sense that it is given an opportunity to be heard in relation to its outcome".

In the case of *Christodoulou v. The Republic* (supra) the recourse was directed against "Polycarpos Yorkadjis, Minister of Interior" and the Court proceeded, on its own motion, at the stage of giving judgment, to amend the description of the respondent so as to become "The Republic of Cyprus, through the Collector of Customs, Nicosia", in order to bring it into conformity with the true facts of the case.

I, therefore, find on the basis of the above that the title of the proceedings may, in this respect be amended.

I now come to consider the first objection, which is that the applicants, Peletico Ltd., have no legitimate interest to make this recourse, because the sub judge decision does not affect any interest of their own, but that of "Peletico Plasters Ltd."

It was submitted by counsel for applicants that the omission of the word "Plasters" from the title of the applicants was due to a typing error and that he would apply for an amendment of the title of the recourse but he subsequently changed his mind and did not do so. He also argued that the applicants "Peletico Ltd." is the mother company of "Peletico Plasters Ltd., holding 80% of their shares and

that as a result they have a legitimate interest to make the recourse.

According to Article 146.2 of the Constitution "a recourse may be made by a person whose any existing legitimate interest is adversely and directly affected by such decision or act or omission".

In the Conclusions from the Case Law of the Greek Council of State (1929-1959) it is stated, at p.258 that the shareholder of an anonymous company does not possess a legitimate interest to challenge every act affecting the interests of the legal person of the company. Also, at pp.261-262 of the same textbook it is stated that legal persons may challenge an act affecting the interests of their members, provided that the protection of those interests is within their objects.

Similarly, in Spyliotopoulos "Manual on Administrative Law" it is stated at pp.362-363 that legal persons may challenge an act adversely affecting the interests of that legal person itself, the protection and the pursuit of which is included in the objects of their memorandum of association, or the interests of their members as a whole, provided protection of them is also included in their objects, but not the interests of some of its members only. And further down, under paragraph 401(b) that the legitimate interest must be direct, in that the applicant himself suffers the damage and no other person with whom he has any special relationship.

The same is also stated in Dactoglou, General Administrative Law, Vol. 1, 1981, at pp.257-258. Also, at p.229 of the same textbook, it is stated that the sphere of the personal interests of a legal person is more limited than that of a physical person and is defined by its memorandum of association or the Law.

In the present case it is obvious, from the objects of "Peletico Ltd." that they have nothing to do with mining and in this respect it cannot be said that any direct interest of theirs is affected by the sub judice decision.

In *Salomon v. Salomon* [1897] A.C. 22, a case that was decided over half a century ago and is still the locus clas-

sicus on the issue decided therein, the principle was established that a company has a personality separate and independent from that of its shareholders. The case was considered by this Court on appeal in the case of *Michaelides v. Gavrielides* (1980) 1 C.L.R. 244 in which the validity of the principle is affirmed and more recently in the case of *The Bank of Cyprus (Holdings) Ltd. v. The Republic of Cyprus, through the Commissioner of Income Tax** where a cogent and lucid exposition of the principle and the exceptions is made.

In the light of the above I find that the applicants have no legitimate interest to pursue this recourse since the sub judice decision did not directly affect any interest of their own, protected by its memorandum of association, but that of its subsidiary, which has a separate legal entity and should have filed the recourse in its own name.

The fact that the name of the applicants appears in the correspondence between them and the Administration and the fact that the letter communicating the sub judice decision was addressed to them (obviously through some error) is, in my view, irrelevant and does not give the applicants the right to file and pursue this recourse against the sub judice decision which did not concern them and which, as I have found, did not directly affect any legitimate interest of theirs.

In spite of the fact that as a result of my above conclusion this recourse must fail on this ground, I propose, nevertheless to consider the preliminary objection with regard to time limit.

The recourse challenges the decision not to issue the licence applied for by application No. 4197 contained in the letters dated 7th September, 1981 and 7th November, 1981. (Perhaps it should here be noted, for what it is worth, that when the letter of the 7th November, 1981 was received by the applicants the seventy-five days had not yet elapsed from the date the first letter of the 7th September, 1981 was written to them).

With regard to the letter of the 7th September, 1981,

* To be reported in (1985) 3 C.L.R.

this recourse is clearly out of time since more than seventy-five days have elapsed until the filing of the recourse on the 27th November, 1981.

With regard to the second letter, that of the 7th November, 1981, this was written upon the request of the applicants for a re-examination of the case. Leaving aside the fact that such letter for re-examination was not addressed to the organ which took the decision, i.e. the Council of Ministers, but to another one, the Ministry of Commerce and Industry, the letter of the 7th November, 1981 does not contain any decision at all. It is simply an explanatory letter describing in more detail the procedure followed in examining the applications and the reasons that led to the decision of the 7th September, 1981 and explaining the queries made by the applicants in their letter of the 28th September, 1981. It was submitted by counsel for applicants that since the letter of the applicants for re-examination was written before the expiration of the seventy-five days period, time begins to run against them from the date they received a reply to it, that is from the 7th November, 1981.

I find myself unable to agree with this proposition. This would have been the case if a re-examination had in fact taken place and a new decision, executory in itself was reached, which as I already found, is not the case here. If there is any executory act that should be in the letter of the 7th September, 1981, by which the decision of the Council of Ministers was communicated to the applicants and since more than seventy-five days have elapsed between such letter and the filing of the recourse, I find that this recourse is out of time and must fail on this ground also.

In view of my findings as above with regard to the preliminary objections, I find it unnecessary to deal with the merits of the case.

In the result this recourse fails and it is hereby dismissed. There will be no order as to costs.

*Recourse dismissed.
No order as to costs.*