

1984 May 30

[A. LOIZOU, SAVVIDES, LORIS, STYLIANIDES, PIKIS, JJ.]

- 1. THE REPUBLIC OF CYPRUS THROUGH,
THE COUNCIL OF MINISTERS,
- 2. THE GRAIN COMMISSION.

Appellants,

v.

“SALAMIS” FLOUR MILLS LTD., AND OTHERS,

Respondents.

(Revisional Jurisdiction Appeal No. 269).

Administrative act—Formality prescribed by law for its issuance—Distinction between essential and non essential formality—Advice of collective organ—The advice of members of such organ is no substitute for the advice of the collective organ—The Advisory Committee set up by s. 4A of the Grain Commission Law, Cap. 68 as amended by s. 3 of Law 83/66—Recommendation by appellant Commission to the Council of Ministers under s. 5(1)(g) of the said law—The advice of the said Committee is an essential formality. 5 10

The Grain Control Law, Cap. 68—Section 5(1)(g) as amended by s. 4(1)(b) of Law 83/66—Section 4A as amended by s. 3 of Law 83/66—Recommendation by appellant Commission under s. 5(1)(g) to the Council of Ministers as to the maximum price of common flour—Constitutes a competence. 15

Administrative Law—Collective organs—Advice provided by law—Advice by individual members no substitute for the advice of the organ itself.

Administrative act—Act of a general content—Distinction be- 20

tween acts of a legislative nature and acts of an administrative nature of a general content—Test applicable.

5 This is an appeal from the judgment of the President of this Court, whereby the Order of the Council of Ministers published on 7.11.69 and fixing the maximum sale price of common flour at 51 mils per oke as well as the recommendations of the appellant Commission that led the Council of Ministers to reach the said decision were declared to be null and void.

10 The said Order was made under s. 5(1) of Cap. 68 as amended by Law 83/66. The recommendations of the appellant Commission were annulled on the ground of failure to comply with an essential formality, namely the procedural requirements laid down by s. 4A of the said law;
15 and the said order was annulled as such recommendations were a most material factor on which the sub judice decision of the Council of Ministers was based.

20 It is not contested that the appellant Commission did not rely or otherwise take into account any advice given by the Advisory Committee set up under s. 4A, nor such advice as to the price of flour was either sought or offered by such Committee. It is also an accepted fact that the Chairman of the Committee informed it about the contracts which the Government had with the association of
25 flour-millers, who are represented in the said Advisory Committee.

30 Counsel for the appellant Commission argued that it was wrong in law to consider that the advice of the Advisory Committee was necessary in the present case and that a violation of a form prescribed for the issue of an administrative act is not always fatal. He further argued that in any event the views of the flour-millers, who were likely to be affected by the decision, were taken and that the omission to seek the advice of the Committee itself
35 was not essential.

Counsel further argued that in making the recommendations to the Council of Ministers the appellant Commission did not exercise any competence in the sense of competence leading to an executory decision but merely

acted in an advisory capacity. This argument was based on the fact that the word "competence" appears in sub-section (2) of s. 4A, whereas in subsection (3) the term "exercise of the functions" is used. It was argued that sub-section (2) was not applicable.

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Finally he submitted that the sub judice order was of a legislative nature.

Held, dismissing the appeal: (1) The views that had to be sought were those of a collective body, i.e. the Advisory Committee, and not the individual views of a member of such body. The advice was by its very nature essential as the fixing of the price was undoubtedly a matter likely to affect materially the interests represented in the Advisory Committee. (A passage relating to the distinction between essential and non essential forms in Delikostopoulos, Violation of Material Form as a ground of Annulment of Administrative Acts 1970, p. 80 was cited by the Court with approval).

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(2) The second argument of counsel cannot be accepted. Indeed as pointed out in the Conclusions of the Case Law of the Greek Council of State 1929-1959 at p. 104 "The competence assigned to various administrative organs may be decisive so that in such cases the administrative organ can issue executory acts or simply advisory ones." Moreover section 5(1) provides that "... the Commission shall have power to perform the following functions.... (g) to recommend to the Council of Ministers the maximum price....". No doubt, the exercise of such a function constitutes a competence.

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(3) The nature of the order in question has to be determined in the light of the text of the legislative provisions under which it was published and the nature of the organ from which it emanated. The sub judice order is an administrative act of general content.

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Appeal dismissed.

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No order as to costs.

Cases referred to:

Charalambides and Others v. The Republic, (1984) 3
C.L.R. 1516.

Appeal.

- 5 Appeal against the judgment of the President of the
Supreme Court of Cyprus (Triantafyllides, P.) given on
the 24th February, 1982, (Revisional Jurisdiction Case
No. 20/70)* whereby the decision of the respondents to
10 fix the maximum sale price of common flour was fixed at
51 mils per oke was annulled.

S. *Georgiades*, Senior Counsel of the Republic, for
the appellants.

G. *Cacoyannis*, for the respondent.

Cur. adv. vult.

- 15 A. LOIZOU J. read the following judgment of the Court.
The respondents in this appeal successfully challenged be-
fore the President of this Court the validity of an Order,
by which the maximum sale price of common flour was
20 fixed at 51 mils per oke, made on the 30th October 1969,
by the appellant Council of Ministers, under Section 5(1)
of the Grain Control Law, Cap. 68 as amended by the
Grain Control (Amendment) Law 1966 (Law No. 83 of
1966) and published under Notification 885 in supplement
25 No. 3 to the Official Gazette of the Republic of the 7th
November 1969. The learned President also annulled the
recommendation of the appellant Commission that led the
Council of Ministers to reach the said decision.

- The ground upon which the said decisions were annulled
is lucidly set out in the judgment appealed from (reported
30 as *Salamis Flour Mills Ltd., and others v. The Republic of
Cyprus through the Council of Ministers and Another*
(1984) 3 C.L.R. p. 132), in which, after the trial Judge
reached the conclusion that the procedure envisaged by
the Law to which reference will shortly be made was
35 mandatory it was stated at p. 138:

* Reported in (1984) 3 C.L.R. 132.

“Having reached, thus, the conclusion that due compliance with the administrative procedural requirements laid down by the provisions of section 4A, above, was an essential formality for the purpose of reaching validly the sub judice decision of the Council of Ministers, I am of the opinion that the failure, on this occasion, of the Grain Commission to conform to the said section 4A is contrary to law and entails the invalidity of its recommendation to the Council of Ministers regarding the maximum price of flour; and, as such recommendation was, by virtue of section 5(1)(g) of Cap. 68, an obviously most material factor on which the sub judice decision of the Council of Ministers was based, its decision has to be treated as being contrary to law also and, consequently, invalid, too.”

The procedure found to be mandatory is provided for in the Grain Control Law, Cap. 68, as amended, by which the Grain Commission, appellants No. 2, was established and its functions and powers are prescribed in Section 5(1) thereof. When this law was first enacted the respondent Commission had power, among the functions it could perform, to fix the maximum price at which the controlled article should be purchased or sold. This provision was, however, amended by Section 4(1)(b) of Law No. 83 of 1966 and paragraph (g) thereof was substituted by the following paragraph (g):

“4. Section 5 of the principal Law is hereby amended as follows:-

(1) In sub-section (1) thereof -

(b) Paragraph (g) is substituted by the following paragraph:

‘(g) to recommend to the Council of Ministers the maximum price or scale of prices at which the controlled article shall be purchased or sold, the Council of Ministers proceeding, after consideration of the recommendation made, to the fixing of such price or

scale of prices by Order published in the official Gazette of the Republic;

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5 Another amendment of the basic law effected by Section 3 of the same amending law was the addition thereto of Section 4(A) which in English reads as follows:

10 “4A.- (1) Upon the making of a Control Order there shall be established an Advisory Committee consisting of the Manager of the Grain Commission as Chairman, two persons capable of representing the interests of the Co-operative Movement, four persons capable of representing the interests of grain producers and four persons capable of representing the interests of millers, bakers, bread consumers and stock-farming products consumers, respectively, all appointed by the Council of Ministers.

15 (2) The Commission shall seek the Advisory Committee’s advice on any matter within its competence and likely to affect materially any of the interests represented on the Advisory Committee, and may consult with it on any matter within its competence.

20 (3) The Advisory Committee may of its own motion make representations to the Commission on any matter arising or likely to arise in the exercise of the functions of the Commission, which the Advisory Committee considers as likely to affect materially any of the interests represented on the Advisory Committee.

25 (4) The Commission shall give consideration to any advice tendered to it by the Advisory Committee under sub-section (2) and to any representations made by it under sub-section (3) and in the event of non-adoption thereof, in whole or in part, it shall notify in writing the Advisory Committee accordingly, sending at the same time a copy of such notification to the Council of Ministers which shall deal with and solve any existing dispute.”

It is an accepted fact born out from the minutes of a special meeting of the Appellant Commission which was held on the 27th October 1969, that its Chairman informed the members about the contracts which the Government had with the Association of Flour-millers on the question of the price of flour and after discussing the matter the appellant Commission decided to recommend to the appellant Council of Ministers that the price for flour used for making ordinary bread should remain at 51 mils per oke. It was also not contested that the appellant Commission did not rely or otherwise take into account any advice given in this respect by the Advisory Committee which was set up under Section 4A of the Law hereinabove set out, nor such advice about the price of flour was either sought from or offered by such Committee.

The said Advisory Committee had been set up by Decision No. 6403 of the Council of Ministers published in Supplement No. IV Part 1. to the Official Gazette of the Republic of the 16th March, 1967, together with the appointment of the Chairman and members of the appellant Commission.

As against the said decision of the learned President who heard the case in the first instance an appeal has been filed and the grounds relied upon are the following:

First, that the trial Judge wrongly held that before the taking of the subject decision there ought to have been taken the opinion provided by the relevant statutory provision, and secondly, if the decision of the trial Judge referred to the opinion of the Advisory Committee, it was wrong in law to consider that same was necessary in the present case.

The argument of learned counsel of the appellants was that the omission to obtain an advice prescribed by law is not always fatal as the violation of a form prescribed for the issue of an administrative act affects its validity only if the omission is considered as essential. It was further argued that in any event the Flour-millers whose interests were likely to be affected had expressed their views before the sub judice decision was reached, as

shown in the minutes of the respondent Commission earlier referred to in this judgment to the effect that the Government had contacts with their Association and that the omission to seek the advice of the Advisory Committee was not essential in itself.

We do not subscribe to this argument as the views that had to be sought were those of a collective body and not the individual views of a member of such collective organ. Moreover the advice to be sought was by its very nature essential as the fixing of the maximum price was undoubtedly a matter likely to affect materially any of the interests represented on the Advisory Committee as provided by sub-section 2 of section 4(A) hereinabove set out:

“The distinction between essential and non-essential forms, has to be made on the basis of the aim which can be discerned from the relevant provisions as being the interests intended to be safeguarded or guarantees emanating for the subject as well as by the effect the omission or the non-correct observance of the form is possibly to have on the content of the act.” (See *S. I. Delikostopoulos Violation of Material Form as a Ground of Annulment of Administrative Acts* 1970 p. 80.

Moreover the very composition of the statutorily established Advisory Committee leads one with certainty to the conclusion that the obtaining of the advice of the said Committee on such a matter as the fixing of the maximum saleprice of common flour constitutes an essential form which had to be observed. The fact that the views of the Flour-millers whose representative was one of several other representatives from other quarters on the Advisory Committee does not change the situation as the views of a collective organ have to be given by it after the views of its members are properly expressed and exchanged and thereupon a conclusion reached whether unanimous or containing dissenting opinions.

The next argument advanced on behalf of the appellants was that the appellant Commission in recommending to

the Council of Ministers the maximum price at which a controlled article should be purchased or sold under paragraph (g) of section 5(1) did not exercise a competence in the sense of competence leading to an executory decision but merely acted in an advisory capacity. This argument was based on the different wording used in subsections 2 and 3 of section 4(A) in which the term competence is used in the subsection and the term exercise of the functions of the Commission is used in subsection 3. It was urged that subsection 2 was not applicable.

We are unable to agree with this argument. It is not in accord with well established principles of administrative Law, as pointed out in the *Conclusions of the Case Law of the Greek Council of State 1929-1959*, p. 104:

“The competence assigned to various administrative organs may be decisive to that in such cases the administrative organ can issue executory acts or simply advisory ones.”

In support of the aforesaid proposition reference is made to the decisions of the Greek Council of State No. 1230/54 232/58 and others.

Whilst on this point, it may be pointed out that even the opinions that have no executory character and those given by way of simple advice, as well as those whose issue is by law only potential have a significance, given that their possible illegality carries along with it the invalidity of the executory act based thereon.

Moreover section 5(1) reads as follows:

“Subject to the provisions of this Law the Commission shall have power to perform the following functions:-”

One of the functions thereafter enumerated are those under paragraph (g) hereinabove set out regarding the power to perform the function to recommend to the Council of Ministers the maximum price, etc. No doubt, the power to exercise this function constitutes a competence. The different expressions used in the two subsections have

no significance once the word "competence" in law could not have the meaning that learned counsel for the appellants has invited us to ascribe to. This disposes of the second leg of arguments advanced on behalf of the appellants.

5 Finally, and as during the concluding stages of the hearing of this appeal counsel for the appellants has raised the question that the sub judice order was a legislative and not an administrative act and that this is a matter that could even at such a late stage be raised, once the Court
10 itself could have raised it ex proprio motu, we felt that we ought to consider it as there were no factual issues that ought to have been established in order to constitute its factual background. The short answer to this is what was said in the case of *Kratinos Charalambides and others*
15 v. *The Republic* (Revisional Jurisdiction Cases 436/79, etc., not yet reported),* namely that the order in question has to be determined in the light of the text of the legislative provisions under which it was published and in view of the wording of Article 146 of the Constitution as
20 well, the nature of the organ from which it has emanated and that it is an administrative act of a general content.

For all the above reasons we find that the approach of the learned President was in Law correct and we dismiss this appeal but in the circumstances we make no order as
25 to costs.

Appeal dismissed.
No order as to costs.

* Now reported in (1984) 3 C.L.R. 1516