1988 December 17

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

1. CHRYSANTHOS ANTONIOU & SONS,
2. CHRYSANTHOS ANTONIOU,

*Applicants,*

v.

1. NICOSIA MUNICIPALITY,
2. NICOSIA MUNICIPAL COUNCIL,
3. NICOSIA TOWN CLERK,

*Respondents.*

*(Case No. 501/84).*

*Recourse for annulment—Ruling that sub judice act is of an executory nature—Retirement from the Bench of the Judge (Triantafyllides, P. who was appointed Attorney-General of the Republic) who issued the ruling, before final adjudication of the recourse—Recourse assigned to another Judge—Directions for rehearing—Whether trial Judge bound by aforesaid ruling—Question determined in the negative—Indeed, retrial entails trial of every matter put in issue by the Application and the Opposition and that includes the justiciability of a recourse, the foremost issue in any recourse—Neither the doctrine of precedent nor the doctrine of Res Judicata are applicable to the issue at hand.*

*Acts or decisions in the sense of Art. 146.1 of the Constitution—The Municipalities Law, Cap. 240 adopted by incorporation by Law 64/64, sections 138-140—Decision to serve notice on applicants to remove a nuisance—Nuisance, its commission and abatement, are primarily matters of private law—The aforesaid provisions intend to confer on Municipalities power to obtain injunctive relief—The sub judice decision is not an adjudication establishing the existence of nuisance—The recipient of the notice is free to apply to a Civil Court and seek its discharge by way of declaration—The criterion of the distinction between public and private law is substantive—A notice under section 139 is in the domain of private law.*

*Executory act—A notice under section 139 of the Municipalities Law, Cap. 240, to remove a nuisance—Does not affect the rights of the addressee—Therefore, it is not of an executory nature.*

The facts and issues raised it this case, as well as the principles expounded and applied by the Court in this case, are sufficiently indicated in the hereinabove headnote.

*Recourse dismissed.*
*No order as to costs.*

*Cases referred to:*

*Makrides v. The Republic* (1967) 3 C.L.R. 147;

*Carayiannis v. The Republic* (1980) 3 C.L.R. 39;

*Republic v. Demetriades* (1977) 3 C.L.R. 213;

*Frangos and Others v. The Republic* (1982) 3 C.L.R. 53;

*Pieris v. The Republic* (1983) 3 C.L.R. 1054;

*Mahlouzarides v. The Republic* (1985) 3 C.L.R. 2342;

*Antoniou and Others v. The Republic* (1984) 3 C.L.R. 623;

*Photiades and Another v. The Republic* (1988) 3 C.L.R. 2084;

*Hellenic Bank v. The Republic* (1986) 3 C.L.R. 481;

*York International Securities Ltd. v. The Republic* (1987) 3 C.L.R. 834.

**Recourse.**

Recourse against the notice served on the applicants to abate the nuisance caused by the storage of metals in their site at Nicosia.

*Chr. Clerides,* for the applicants.

*A. Pandelides,* for the respondents.

*Cur. adv. vult.*

PIKIS J. read the following judgment. This case has a long history that must be recounted in order to examine the issues raised in perspective. The applicants deal in metals. Their merchandise is stored on a site at Nicosia. The use made of the site constituted, in the opinion of the Municipality of Nicosia, a nuisance. In exercise of the powers vested in the Municipality by s.139 of the Municipalities Law (Cap. 240 adopted by incorporation by Law 64/64) they served upon the applicants a notice to abate it. Section 138 (as amended by s.2 of Law 89/70) defines the ingredients of nuisance according to the Statute. Applicants objected to the notice; they disputed the view taken by the Municipality of the use made of the site and the validity of the notice itself.

The present recourse was raised in September, 1984. The review of the notice and the decision referred to therein were sought with a view to their annulment. The decision and the notice incidental thereto are challenged as contrary to law, namely ss. 138 and 139 - Cap. 240 and, as founded on an unconstitutional legislative enactment. In their contention s. 139 offends the separation between the powers of the State granted in the Constitution of the Republic. To the extent this submission has been articulated by the address of counsel for the applicants, it appears to be their position that s. 139 confers a species of judicial power on municipal corporations, that is, an administrative authority in breach of the constitutional framework that vests the whole spectrum of judicial power wholly and exclusively in the judiciary. In the grounds of law cited in the application in support of the remedies sought, reference is also made to articles 23, 25 and 26 of the Constitution the relevance of which is hard to discern in the context of the present proceedings. Seemingly these articles were abandoned as a basis for the plea of unconstitutionality , an inference that may

be drawn from the absence of any reference to them in the final address of counsel for applicants.

The respondents opposed the recourse on three grounds:-

(a) Lack of justiciability of the subject matter.

(b) Validity of the decision on the merits and the notice embodying it; and

(c) absence of any inconsistence or incompatibility of the provisions of s. 139 of the law, with any article of the Constitution or the doctrine of separation of powers.

Articulating their objection to the justiciability of the recourse the respondents contended that the action complained of was not executory in the sense required by article 146.1 of the Constitution.

The trial of the recourse was assigned to H.H. Triantafyllides, P. The learned Judge directed that the competence of the Court,to take cognizance of the subject matter of the proceeding should be decided before any inquiry into the merits of the case. On 15.2.86, after hearing the parties, the Court ruled that the notice complained of was an executory act or decision and as such cognizable by the Court. The notice to abate what was claimed to be a nuisance, was prejudicial to the rights of the applicant who could, therefore, seek its review by way of judicial action. Prayer (B) of the recourse, directed towards the omission of the respondents to reply to a letter of the applicants, was dismissed as non justiciable. Thereafter, the case was fixed for directions on numerous occasions. In due course directions were given for the submission of written addresses. On 22.7.87 directions were issued that addresses be submitted by 15.11.87. The litigants failed to comply with the directions of the Court. An extension of time was granted for the purpose of facilitating the parties to submit their addresses; and the case was adjourned for further directions to 25.4.88. On or before 1.4.88, Trantafyllides, P. retired from his

position as a member of the Supreme Court consequentially to his appointment to the Office of Attorney-General of the Republic. By directions of the Supreme Court the cases that were pending before Triantafyllides, P. , were reassigned for trial to the other members of the Supreme Court. Following these directions and in furtherance thereof, this case was assigned to me for trial - a fact duly noted on the record of the Court of 25.4.88.

The addresses of the parties had not been submitted by 25.4.88. The Court, evidently espoused the view that this is a proper case for the submission of written addresses, extended the time for the submission of the address in reply, and fixed the case for clarifications on 10.6.88. On that occasion I sought the views of the parties on the implications of the ruling of the Court of 15.2.88, intimating my reservations as to the justiciability of the subject matter of the proceedings. The case was fixed for hearing on 20.9.88. Oral arguments were advanced by Mr. A. Pandelides in support of the submission that the ruling of the Court, of 15.2.86, is not binding on me whereas submissions to the contrary were raised in due course by counsel for the applicants. Mr. Chr. Clerides made reference, in particular, to two decisions of the Supreme Court that establish, in his submission, that it is incompetent for this Court to examine afresh matters resolved by the ruling of the Court of 15.2.86. The decisions are those in *Makrides v. Republic* (1967) 3 C.L.R. 147,151 and *Carayiannis v. Republic* (1980) 3 C.L.R. 39, 42.

I have carefully examined both cases and far from agreeing with the ratio attributed by counsel (as deriving) to them, I am of the view that they support the contrary proposition. Both were cases that were reassigned for trial to other members of the Court following absence and retirement, respectively, of the members of the Supreme Court to whom the cases had been originally assigned for trial. It was decided in both that the Court should proceed to dispose of the cases on the basis of the addresses already raised by counsel. The Court, however, took pains to stress on both occasions that it was competent for the second Court to which the case was assigned, to invite further arguments or give

such directions for the elicitation of the issues as it might deem appropriate; for the obvious reason that the reasignment of the cases necessarily entailed their rehearing. Any contrary proposition would breach the fundamental rule pervading every facet of the administration of justice, namely that the trial of the case-that is the resolution of the issues in dispute - is heard and determined by one and the same Bench. Incidental matters that may be properly divorced from the issues of the case, such as an interim order, may be determined by a Bench with a different composition, for the obvious reason that they leave unaffected and they do not prejudge any of the matters at issue. The foremost issue in any proceeding is the competence of the Court to take cognizance of the case. No court charged to try a judicial cause can be denied freedom to examine the issue of jurisdiction. Acceptance of the contrary view would inevitably fetter judicial freedom of thought and conscience, incompatible with the exercise of judicial functions.

The retrial of a case necessarily entails the trial of every matter put at issue by the pleadings, that is, the application and opposition thereto. And that necessarily includes the justiciability of the subject matter of the proceedings. The question debated above is wholly separate and independent from any questions of precedent, that is, the binding effect of a previous judgment of the Supreme Court on subsequent judicial determinations. The doctrine of binding precedent is deeply rooted in our judicial system and finds expression daily in judicial pronouncements. This is not proper case to debate its spectrum save to refer to the leading case on the subject of *Republic v. Demetriades* (1977) 3 C.L.R. 213 and note that first instance judgments are not strictly binding on courts of coordinate jurisdiction. As explained in *Frangos and Others v. Republic,* (1982) 3 C.L.R. 53 judgments of courts of coordinate jurisdiction are, as a rule, followed in the interest of certainty of the law; but they may be departed from whenever the Court is of the view that they are founded on a wrong principle of law or are fraught with an error in the reasoning. In the case of *Frangos,* supra, a different view was taken from that adopted in an earlier case of the justiciability of certain preparatory acts re-

volving on analysis of the implications of the act and its character.

Res judicata is yet another subject debated by counsel in juxtaposition to the implications of the decision of 16.2.86. In *Pieris v. Republic* (1983) 3 C.L.R. 1054 (F.B.) we examined the applicability of the doctrine of res judicata in the field of administrative law and its implications. It was noted that the doctrine finds application in judicial adjudications under article 146.1 provided -

(a) there is an adjudication in the merits, and

(b) the point at issue was decided directly or by necessary implication in the first recourse.

In this case not only there was no adjudication on the merits but with the directions for retrial all matters at issue were reopened for judicial consideration and determination.

In the light of the above the Court is not barred from inquiring into the justiciability of the subject matter of the proceedings. Consequently, the first question I must address is whether a notice given under s.139 of Cap. 240 is amenable to judicial review under article 146.1.

First, we must consider the nature of the subject matter of a notice under s.139 in order to determine the domain of the law in which the notice operates. Sections 138-140 deal with nuisance, associated with the use of land and premises. Nuisance, its commission and abatement are primarily matters of private law. Public and private nuisance are actionable torts under ss. 45 and 46 of the Civil Wrongs Law - Cap. 148. The relevant provisions of the Municipal Corporations Law (ss. 138 - 140) are designed to confer power to the Municipality to take action to stem acts of nuisance. The interest of the Municipaliy in the abatement of nuisance cannot be doubted on consideration of their status as the public authority responsible in law for ensuring the use of land and premises within the municipal area, according to law. The

object of the Chapter entitled "Nuisances" of the Municipal Corporations Law, is primarily intended to confer on the Municipality a right to apply for injunctive relief. Section 139 authorises the service of notice of the addressee of the view taken by the Municipality of the use made by the land or premises in order to afford an opportunity to him to remedy the alleged misuse. Contrary to the submission of counsel, s. 139 is not tantamount to an adjudication establishing the existence of nuisance. The recipient of the notice of the free to apply to a civil court and seek its discharge by way of declaration. On the other hand, if use is made by the Municipality of the power vested by s. 140, they cannot act upon the premise that a nuisance has been committed by serving a notice under s.139. I am, therefore, driven to the conclusion that the subject matter of the recourse is not cognizable by way of judicial review of administrative action.

The charting of the domain of law in which administrative action operates for the purpose of determining its reviewability under s.146.1 of the Constitution, was the subject of explicit examination by the Full Bench of the Supreme Court in *Mahlouzarides v. Republic,* (1985) 3 C.L.R. 2342 and earlier on in *Antoniou and Others v. Republic* ((1984) 3 C.L.R. 623 - a first instance judgment). The question was canvassed anew in the recent decision of the Full Bench in *Photiades and Another v. Republic* (1988) 3 C.L.R. 2084; see, also, *Hellenic Bank v. Republic* (1986) 3 C.L.R. 481; *York International Securities Ltd. v. Republic* (1986) 3 C.L.R. 834). The caselaw conclusively establishes that a substantive as opposed to a formal criterion is applied to determine the domain of the law to which action of the Administration belongs. I am left in no doubt that notice under s. 139 constitutes action of the Administration that sounds in the domain of private law and as such it cannot be made the subject of judicial review under article 146.1. It must be mentioned that Triantafyllides, P. was never asked to determine at the preliminary stage the reviewability of the sub judice decision seen from the angle of the domain of law to which it belongs. There would be nothing to prevent him from addressing the question at the end of the day being, as it is always open to the Court to examine, be it on its

own motion, the justiciability of the subject matter of the proceedings.

Furthermore, a notice under s. 139 lacks the attributes of a decision of an executory character and in this I must voice my disagreement with the ruling of Triantafyllides, P., as he then was, on the subject. A notice under s.139 does not produce any noticeable legal consequences and in that way it does not prejudice any rights vested in the addressee. As earlier noticed it does not establish that nuisance has been committed. It is more an act of an advisory nature and to the extent that it may be linked to subsequent, action, an act of a preparatory character. In any proceedings that may follow for the abatement of nuisance, the burden is on the Municipality to establish its commission and the need for its abatement.

For the reasons indicated above, the subject of the proceedings cannot be made the subject of review under article 146.1 of the Constitution and, for that reason, it must be dismissed. And so I direct.

Let there be no order as to costs.

*Recourse dismissed.*
*No order as to costs.*