

1988 March 28

[TRIANTAFYLIDIS, P., MALACHTOS, SAVVIDES,
PIKIS AND KOURRIS, JJ.]

PANAYIOTIS KYRIACOU AND OTHERS,

Appellants - Applicants.

v.

THE MINISTER OF INTERIOR,

Respondent.

(Revisional Jurisdiction Appeal No. 563).

5 *Constitutional Law—Revisional Jurisdiction—Judgment voiding administrative action—Constitution, Arts, 146.4 (b), 146.5 and 150—The duty of active compliance with such an action—Whether breach of such duty amounts to contempt—Question determined in the affirmative—Whether compliance with O.42A of the Civil Procedure Rules a necessary prerequisite of the punishment for contempt—Question answered in the negative.*

10 *Revisional Jurisdiction—Practice—The Supreme Constitutional Court Rules, 1962, Rule 18—The applicability in virtue thereof of the Civil Procedure Rules is subject to the compatibility of such Rules with the Constitution or the nature of the revisional jurisdiction.*

Contempt of Court—See Constitutional Law—Revisional Jurisdiction.

15 The issue raised in this appeal is the nature and effect of a declaration of nullity of administrative action given under para. 4(b) of Art. 146 of the Constitution and the implications stemming from such judgment, particularly the duty of the Administration to give effect to it.

Held, allowing the appeal, Malachtos and Savvides, JJ. dissenting: (1) A judgment voiding administrative action operates erga omnes. The Administration, in fact everyone having a say in the matter, must obliterate the consequences of the annulled act and effectively restore legality.

The duty to remove the after effects of annulled administrative action is a positive one requiring the Administration to remove the side effects of the action.

(2) What is achieved in Greece by penal and disciplinary legislation, it is achieved in Cyprus by Art. 146.5 in conjunction with Art. 150 of the Constitution. Para.5 of Art. 146 is definitive of the attributes of a declaratory judgment given under para. 4. The obligation is not confined to observing the judicial declaration of voidance but binds everyone, particularly the Administration, to ".....ενεργών συμμόρφωσιν προς ταύτην....."- "active compliance thereto."

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(3) A person may be committed for contempt for breach of the aforesaid duty of active compliance.

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(4) The next question is whether the exercise of the jurisdiction under Art. 150 is subject to the provisions of Ord. 42A, r.I, of the Civil Procedure Rules, stipulating service of an endorsed copy of the order or judgment as a prerequisite to committal for contempt.

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(5) In virtue of Rule 18 of the Supreme Constitutional Court Rules the Civil Procedure Rules apply to proceedings under Art. 146 *mutatis mutandis*. Such applicability is subject to their compatibility with the provisions of the Constitution and the nature of the revisional jurisdiction.

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(6) Any attempt to curtail the aforesaid duty of active compliance or limit its application or efficacy, would run counter to the Constitution. Moreover, the provisions of Ord. 42A are hardly compatible with the status and impersonal nature of state organs bound to active compliance with the order of the Court.

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It follows that O.42A is not applicable.

Appeal allowed.

Cases referred to:

Ioannides v. The Republic (1971) 3 C.L.R. 8;

Nicolaidis v. Yerolemi (1984) 1 C.L.R. 742;

Nissiotou v. The Republic (1983) 3 C.L.R. 1498;

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Republic v. Nissiotou (1985) 3 C.L.R. 1335;

Kyriacou and Others v. The Republic (1986) 3 C.L.R. 300;

Husson v. Husson [1962] 3 All E.R. 1056;

Evangelou and Others v. C.B.C. (1986) 3 C.L.R. 755.

Appeal.

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Appeal against the judgment of a Judge of the Supreme Court of Cyprus (A. Loizou, J.) given on the 21st February, 1986 (Revisional Jurisdiction Case No 198/78)* whereby appellants' application for an order of the Court ordering the imprisonment of the Chief of Police for contempt of court was dismissed.

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P. Angelides, for the appellants.

R. Gavrielides, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

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TRIANTAFYLLIDES P. The majority judgment of the Court, with which Kourris, J. and myself agree, will be delivered by Piki J.

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PIKIS J.: In this appeal an important question of constitutional law must be decided: The nature and effect of a declaration of nullity of administrative action given under para. 4 (b) of Art. 146 of the Constitution and , the implications stemming from such judgment, particularly the duty of the Administration to give effect to it. If we find that a positive duty is cast on the Administration to eradicate the ill-effects of the voided action, we must next determine whether defiance of that duty or refusal to give effect to it renders the officials responsible guilty of contempt of the Supreme Court under Art. 150 of the Constitution.

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* (Reported in (1986) 3 C.L.R. 300)

The learned trial Judge decided that judgments given under para. 4(b) of Art. 146 are declaratory in nature and do not cast a positive duty on the Administration such as would render anyone refusing to take action warranted thereunder liable to be committed for contempt under any article of the Constitution. The jurisdiction of the Supreme Court to punish for contempt of itself, conferred by Art. 150, presupposes because of the nature of contempt, the existence of a mandatory directive in the judgment itself, an attribute wholly absent from a declaratory judgment issued under para. 4(b). Jurisdiction under Art. 150 is necessarily dependent on the presence of a positive duty such as the one that existed in the case of *Ioannides v. Republic* (1971) 3 C.L.R. 8, where a number of persons were found guilty of contempt for disobeying a provisional order of the Court prohibiting the deportation of the applicant.

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Para. 5 of Art. 146 of the Constitution does not, in the view of the learned Judge, alter the nature or complexion of a judgment given under the preceding paragraph, para. 4(b), nor does it add to its tenor. Para. 5 imposes a separate and independent constitutional obligation unrelated to the efficacy of the judgment or the provisions of Art. 150. If at all susceptible to contempt proceedings to justify committal for contempt, the provisions of Ord. 42A, r.1, must be complied with. This order of the Civil Procedure Rules requires that an endorsed copy of the judgment or order of the Court be served upon those to whom it is addressed requiring them to take the action named therein within a specified time; warning them, at the same time, of liability for contempt of Court in case they fail to take the action ordained in the judgment of the Court.

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For the above reasons, the trial Court decided that contempt proceedings raised against the Chief of the Police for alleged failure to give effect to a declaratory judgment of the Supreme Court were ill - founded and unsustainable in law.

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In order to answer the questions raised in this appeal we must explore the nature of a declaratory judgment under Para. 4(b) of

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5 Art. 146 of the Constitution and ascertain its implications. A judgment voiding administrative action operates erga omnes (See Conclusions from the Greek Council of State 1929-1959, p. 281). Like a judgment affecting status in the domain of private law, (*Nicolaidis v. Yerolemi* (1984) 1 C.L.R. 742, its implications are not confined to the parties to the proceedings. This is a natural sequence of a declaration of illegality and a corollary of judicial review of administrative action designed to ensure that the Administration operates within the limits of the law and in accordance with the norms of sound Administration. But the matter does not end there. The Administration, in fact everyone having a say in the matter, must obliterate the consequences of the annulled act and effectively restore legality. The implications stemming from a declaration of annulment are discussed by Mr. Kourousopoulos, President of the Greek Council of State, in an illuminating article on the nature and effect of the jurisdiction of the Greek Council of State. (See Lecture to the Nicosia Bar Association 1984, p. 11.) The duty to remove the aftereffects of annulled administrative action is a positive one requiring the Administration to remove the side effects of the action. In Greece, default on the part of the Administration to carry out this duty and effectively restore legality, renders the official or officials responsible liable to penal and disciplinary sanctions (See s. 50(4) - 3713/1928). A similar objective is achieved by para. 5 of Art. 146 viewed in conjunction with Art.150 of the Constitution.

30 Para. 5 of Art. 146 is definitive of the attributes of a declaratory judgment given under para. 4. The obligation is not confined to observing the judicial declaration of voidance but binds everyone, particularly the Administration, to "..... ενεργόν συμμόρφωσιν προς ταύτην....." - "active compliance thereto". Asside from the natural implications of para. 5 of Art. 146 examined in juxtaposition to para. 4 (b), earlier described, there is authority too supporting the proposition that para. 5 is an adjunct to para. 4 definitive of the attributes of a declaratory judgment. In *Republic v. Nissiotou*, (1985) 3 C.L.R. 1335, it was held at p. 35 1350, 13-19; judgment by Triantafyllides, P.).

"In our opinion only para. 4 of Art. 146 of the Constitution provides about the remedies to be granted in recourse under such article; and para. 5 of Art. 146 does not provide for a separate or additional remedy but can only be invoked and applied in relation to an application for punishment for contempt of Court under Art. 150 of the Constitution".

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See also first instance judgment on the nature of contempt under Art. 150 of the Constitution *Nissiotou v. Republic* (1983) 3 C.L.R. 1498.

The nexus between Art. 150 and judgments given under Art. 146 is made clearer still in a subsequent passage in the above case p. 1351, 15 - 18.

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"Under Art. 150 of the Constitution the Supreme Constitutional Court has jurisdiction to punish for contempt of itself; and , of course, one form of contempt is non-compliance with its judgments".

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Therefore, as a matter of principle, analysis of the provisions of paras. 4 and 5 of Art. 146 of the Constitution and authority, para. 5 of Art. 146 imposes a duty of active compliance, as earlier indicated, for breach of which a person may be committed for contempt under Art. 150 of the Constitution.

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Next we must decide whether the exercise of the jurisdiction under Art. 150 is subject to the provisions of Ord. 42A, r.I, of the Civil Procedure Rules, stipulating service of an endorsed copy of the order or judgment as a prerequisite to committal for contempt. The endorsement serves to specify the act, limit the time within which the act is to be done and warn of the punitive consequences of disobedience.

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Rule 18 of the Supreme Constitutional Court Rules 1962 (made applicable by s. 17, Law 33/64) makes the Civil Procedure Rules applicable to proceedings before the Supreme Court in the exercise of its revisional jurisdiction "mutatis mutandis to all pro-

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ceedings before the Court so far as circumstances permit or unless other provisions have been made by these Rules or unless the Court or any Judge otherwise directs".

5 It is clear from the wording of R. 18 that the applicability of any order of the Civil Procedure Rules is subject to its compatibility with the provisions of the Constitution and the nature of the jurisdiction conferred thereunder upon the Supreme Constitutional Court. Where the Constitution casts, as in the case of para. 5 of Art. 146, a duty of active compliance, any attempt to curtail this
10 duty or limit its application or efficacy, would run counter to the Constitution. And would, as a result, defeat the intention of the constitutional legislator. Moreover, the provisions of Ord. 42A are hardly compatible with the status and impersonal nature of state organs bound to active compliance with the order of the
15 Court. One of the organs bound to give effect to a judgment under para. 4 of Art. 146 is the Court of law. Could it be argued that the obligation of a civil Court to heed and give effect to a judgment given under Art. 146.4(b) for the purposes of awarding damages under para. 6 of the same article could be made dependent on compliance with Ord. 42A; The mere asking of the question suggests a negative answer and so it is.
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We conclude, contrary to the view taken by the learned trial judge, that the obligation to active compliance cast by para. 5 of Art.146 is in no way dependent on observance of the provisions of Ord. 42A. The appeal is allowed.
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A date will be given for hearing the merits of the application.

SAVVIDES J. : This is an appeal from the judgment of a Judge of this Court sitting in the first instance whereby he dismissed an application by the appellants seeking:-

30 (a) An order of the Court ordering the imprisonment of the Chief of Police for contempt of Court.

(b) Judgment and/or declaration of the Court that the continued

forbearance and/or consent of the Chief of Police that the interested parties bear the rank of a Sergeant Constitutes contempt of Court.

The facts of the case appear in the judgment of the learned trial Judge and I need not repeat them (see *Kyriacou and Others v. The Republic* (1986) 3 C.L.R. p. 300). 5

The learned trial Judge decided that judgments of the Court given under paragraph 4(b) of Article 146 of the Constitution are of a declaratory nature and therefore no proceedings for contempt could be taken against the Administration for non-compliance. He went further, however, and considered the procedural requirements for contempt proceedings and came to the conclusion that in the present case there had been compliance with the prerequisites of the Civil Procedure Rules and in particular O. 42(A). 10

The questions which pose for consideration in the present appeal are the following:- 15

(a) Whether contempt proceedings lie in respect of non-compliance by the administration with a declaratory judgment under Article 146.4 (b) of the Constitution.

(b) Whether the procedure followed in the present case was in compliance with the Civil Procedure Rules. 20

Before proceedings with the first question which touches the merits of the case I shall deal with the second question, that is, whether the procedure contemplated for attachment for contempt has been complied with to enable the appellants proceed with the substance of their application. 25

In order to hold that a person has committed contempt, certain prerequisites have to be satisfied first. It must be established that the terms of the order or judgment are clear and unambiguous and that the respondent has proper notice of such term. As it was held in *Husson v. Husson* [1962] 3 All E.R. 1056: 30

"A person cannot be held guilty of contempt in infringing an order of the Court of which he knows nothing."

In *Evangelou & Others v. C.B.C.* (1986) 3 C.L.R. 755 at pp. 762, 763, I had the opportunity of dealing with this matter and I fully adopt what I said in that case.

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Rule 18 of the Supreme Constitutional Court Rules 1962, provides as follows: -

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"The Civil Procedure Rules in force in the Republic on the date of the making of these Rules shall apply, *mutatis mutandis*, to all proceedings before the Court so far as circumstances permit or unless other provision has been made by these Rules or unless the Court or any Judge otherwise directs."

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The effect of such rule is that the Civil Procedure Rules are deemed to apply *mutatis mutandis* to proceedings in the Supreme Court in its revisional jurisdiction. The relevant order, of the Civil Procedure Rules dealing with this matter, is Order 42 A which, *inter alia*, provides:-

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"1. Where any order is issued by any Court directing any act to be done or prohibiting the doing of any act there shall be endorsed by the Registrar on the copy of it, to be served on the person required to obey it, a memorandum in the words or to the effect following:

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'If you, the within-named A.B., neglect to obey this order, by the time therein limited, you will be liable to be arrested and to have your property sequestered.'

2. An office copy of the order shall be served on the person to whom the order is directed. The service shall, unless otherwise directed by the Court or a Judge, be personal."

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In the marginal note to such order reference is made to the corresponding old English Rule, Order 41, rule 5, which, to the extent relevant to the present case, reads as follows (Annual Practice, 1960, p. 954):-

"Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment, or order within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be indorsed a memorandum in the words or to the effect following, viz.:-

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' If you, the within-named A.B. , neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment (or order)."

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As one may notice from the wording both of Order 42 A of our Civil Procedure Rules and Order 41 rule 5 of the English Rules, especially the expressions "there shall be endorsed", "shall be served," "shall state the time," compliance with the provisions of such order is mandatory.

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In the notes to the English Order 41, rule 5, we read the following (see Annual Practice, 1960, at p. 956) :-

"An attachment of a person for disobedience to an order requiring him to do a given act within a given time will not be directed unless a copy of the order, with a proper endorsement, has been personally served upon him in due time, or unless he has had notice of the order and is evading service thereof."

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It is an undisputed fact in the present case that the requirements set out in Order 42 A as regards service and endorsement of the order have not been complied with. There has not been personal service such as defined by Order 5 of our Civil Procedure Rules, as service by double-registered letter or otherwise is considered in rule 9 thereof, as substituted service and not personal. Secondly, the respondent was not served with a properly endorsed copy of the judgment with the appropriate notice, as it is provided by Order 42 A, rule 1.

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I find myself in agreement with the finding of the learned trial Judge on this issue. Therefore, on this ground alone, the present appeal has to be dismissed.

5 Having found as above, I find it unnecessary to deal with the question as to whether contempt proceedings can be taken in cases of declaratory judgments under Article 146.4 (b) of the Constitution.

In the result, the appeal fails and is hereby dismissed with no order for costs.

10 MALACHTOS, J.: I agree with the judgment delivered by my brother Judge Savvides which I had the advantage to read in advance and I have nothing to add.

*Appeal allowed by majority.
No order as to costs.*