SUPREME COURT OF CYPRUS

APPELLATE HEARING

CIVIL APPEAL NO. E178/2014

August 11, 2020

PI. PANAYI, G. N. YIASEMIS, X. MALACHTOS J.J.

BETWEEN:

xxx PAPATHANASIOU,

Appellant / Plaintiff,

-AND-

1. CYPRUS UNIVERSITY OF TECHNOLOGY,
2. xxx KERAVNOU-PAPAILIOU,

Defendants

Stefanos Savvas of Papantoniou & Papantoniou LLP for the Appellant.

George Augusti-Konstantinou of Giannis Konstantinidis & Associates LLP for the Defendants.

COURT: The unanimous decision of the Court will be delivered by Judge P. Panayi.

JUDGMENT

PANAYI J:- By an action filed in the District Court of Limassol, the appellant claimed damages, general and special, for breach of contract and / or negligent conduct by the first defendants — Cyprus University of Technology (hereinafter "CUT") — and by the second defendant, who was the Rector of CUT at the relevant time.

In their defense, the defendants raised four preliminary objections. They requested that they be tried in a preliminary hearing, through an application based primarily on Order 27 of the Civil Procedure Rules, ss 1-4. This request was approved. The appellant opposed the approval of the request on a number of grounds. At first instance, the District Court examined the case, referring to the case file, to documents which were revealed by the defendants through an affidavit of disclosure, and to legal principles which delimit the power exercised under Order 27. The Court observed that the claim of the appellant was based on the revocation by the defendants of his appointment as associate professor in Speech-Language Therapy/Speech-Language Pathology, the validity of which he challenged through an application to the Supreme Court (no. 1057/12). The Court found, rejecting suggestions as to the contrary by the appellant, that there were "clear, certain and indisputable background facts which give jurisdiction to the District Court to rule upon the claim of the plaintiff [appellant]". The Court also noted that its decision on whether to grant the preliminary hearing — here decided in the defendants' favour — had, in essence, settled the action without prejudice. Examining further this unique point, it considered the question whether, in light of the indisputable facts, the Supreme Court had a duty to adjudicate on the issues raised, in exercising its exclusive jurisdiction under Article 146 of the

Constitution (as it then was). That question was answered in the affirmative. It was also held that the action had been premature and the appellant should first succeed in annulling the revocation of his appointment, before claiming against CUT for the material damage which he alleges to have suffered. Only in the event that CUT refused to compensate the appellant for the unfair revocation of his appointment would the appellant have an actionable right as against CUT. As a result of its findings, the first instance Court dismissed the action on the ground that it lacked jurisdiction to hear the appellant's claim.

This appeal challenges the first instance decision, which rejected the appellant's claim.

In examining the question of jurisdiction — in a case such as this, where an examination was sought through an application for a preliminary ruling — a court is required to consider the differences between the submissions of the parties, as they appear in the court bundle (see, inter alia, ***Sartas Importers-Distributors Ltd v. Maroulli*** ***(2003) 1 (C) A.A.D. 1446*** and ***Mourtzinos v. Global Cruises Ltd*** ***(1992) 1 (C) A.A.D. 1160***). Indeed, that course was followed by this Court, in order to map the disputed issues which it was called upon to decide.

According to the appellant, during the relevant time, he worked as a Deputy Professor at the Technological Educational Institute of Patras ("TEI of Patras"), in the Department of Speech-Language Therapy. During 2010, or around that year, the defendants (of whom the first defendant is considered a public authority) were accepting applications from suitably qualified persons to fill the vacant position of Professor or Associate Professor in Speech-Language Therapy, in the Department of

Rehabilitation Sciences. The appellant applied and was interviewed for this position. At the end of the interviews, on 16/12/2011, the Administrative Committee of CUT unanimously approved the proposal of the Electoral Body to offer the position to the appellant. Subsequently, on 28/12/2011, the appellant was informed of his selection by an email from a Deputy Professor at CUT, who invited the appellant to assume his position at his earliest convenience, and in any case no later than early March 2012. Once the appellant confirmed his acceptance of the position, the defendants sent him a letter (dated 31/1/2012) asking him to submit within one month a confirmation of his intention to resign from his position at the TEI of Patras and a confirmation from the Greek authorities that the appellant would cease all other professional and business activity once he took up his position at CUT. Fully compliant, the appellant sent the defendants the relevant documents and waited to be informed of his exact starting date, a matter regarding which the parties exchanged correspondence. This had the effect of terminating his prior professional activity, such that the appellant became dedicated exclusively to his new duties at CUT.

On 2/5/2012, the appellant received a letter from the defendants informing him that the decision regarding his appointment had been revoked; the Board had ratified a decision by the Senate, dated 4/4/2021, to revoke the "*offer and / or appointment to that position"*. The reason given for this was that the Electoral Body which proposed the appointment of the appellant had been poorly composed. The defendant responded with a letter from his lawyers, dated 21/5/2012, informing the defendants, among other things, that as a result of their decision he suffered serious financial damage as well as non-pecuniary loss, since he relied on their written confirmation that he would be appointed to the aforementioned position. He also informed the

defendants that he had taken various actions which resulted in the cessation of his professional and business activity, as well as to loss of his high income. In a Claim Form alleging unlawful conduct by the defendants, the appellant claimed, inter alia, that CUT acted negligently and with fault through the illegal composition of the Appointment Committee, while the second defendant knew or ought to have known of the “illegal composition” of that body, which she allegedly hid from the appellant.

It appears from the case file that the appellant, alongside the action which he filed with the District Court, appealed to the reviewing jurisdiction of the Supreme Court by registering an appeal (no. 1057/2012), pursuant to Article 146 of the Constitution of the Republic of Cyprus ("the appeal"). In the appeal, the appellant requested the annulment of the decision of the Council of CUT which, in ratifying the decision of the university Senate, revoked the decision of the Administrative Committee, dated 16/12/12 to award the appellant the position which he sought. Furthermore, in the context of disclosure of documents during the first instance hearing, the defendants attached to their relevant affidavit another appeal, which was filed by the appellant against CUT on 11/7/2013 (no. 5733/2013), requesting that CUT should not repeat what they did to him by annulling their decision of appointment when they tried to fill the position once more.

As noted by the first instance Court, the defendants’ defense was grounded on them having followed the due process for filling the position at issue. A central point in the defense was that everything that took place, including the revocation of the appointment, pertains to the reviewing jurisdiction of the Supreme Court under Article 146 of the Constitution.

The correctness of the first instance decision is challenged on six grounds of appeal, of which the question of whether or not the first instance Court had jurisdiction to hear the appellant's case arises as the paramount issue. The appellant considers the decision of the first instance Court — that his claim did not cease to have at its core the revocation of his appointment — to be wrong, the review of which decision pertains exclusively to the reviewing jurisdiction of the Supreme Court. The appellant further argues that the damaging acts of the defendants did not involve administrative functions and were, therefore, not administrative acts. Rather, these acts preceded the revocation and gave rise to civil liability issues, which fall within the sphere of private law.

The responsibilities of CUT are governed and regulated by the Law of the Cyprus University of Technology 2003 (Law 198 (I) / 2003), as amended from time to time, and the regulations which arise under that Law. There is no doubt that the whole process of selection of academic staff, which is provided for by law, falls within the sphere of public law and was controlled, at the relevant time, by the reviewing jurisdiction of the Supreme Court. As aforementioned, the appointment procedure in this case did not result in an executory administrative act, which raises the question of whether the defendants' previous actions (as outlined in the appellant's petition) give rise to an actionable right which the appellant can exercise by appealing directly to a civil court. During the hearing, it was argued by the learned counsel for the appellant that these previous actions fell outside the due administrative process for appointing university staff, such that the university administration is civilly liable in respect of the appellant’s loss under Article 172 of the Constitution of the Republic of Cyprus[1].

Article 172 of the Constitution recognizes the right to sue the Republic for illegal acts or omissions of a government employee or their subordinate. This constitutional provision also extends to public law. In this area, however, as noted in **A. N. Loizos, Constitution of the Republic of Cyprus,** p. 410:

> "The harmful, unlawful acts or omissions referred to in Article 172, which are committed such that their review falls within the scope of Article 146, give rise to an actionable right, which cannot be exercised directly in a civil court but only following a decision of the court under paragraph 4 of Article 146, in accordance with Article 146.6. Where the claim falls within the scope of Article 146.1 no parallel claim may be brought under Article 172."

As has been repeatedly declared in the case law, the administrative function includes all the acts which relate to the exercise of administrative power and which result in the issuance of an administrative action or decision.

In the present case, the first instance Court held that:

> "It is very clear and unambiguous that, whichever form the plaintiff's claim might come in, and in whichever form it attempts to appear, it does not cease to have at its core the revocation of his appointment to the academic position of Professor at the Cyprus University of Technology, in the specialism of Speech-Language Therapy/Speech-Language Pathology, which is an administrative act, the review of which falls exclusively within the reviewing jurisdiction of the Supreme Court. Indeed, the plaintiff appealed to the Supreme Court with the same appeal. The addition of the second defendant to the appeal, in her capacity as Rector of CUT, does nothing to change the landscape, nor can it save the plaintiff's appeal, because in no way does it change the fact that there is an administrative process for appointing and revoking professors at CUT."

We note that the first instance Court erred in approaching the plaintiff's application on the basis that he had been appointed to the position at issue through an administrative act. This was not apparent from the case-file, nor was it a common ground between the parties. The parties did not even agree on whether there had been an offer of appointment, since the appellant claimed that he received and immediately accepted an offer of appointment, while the defendants in their defense claimed that the second defendant, in her capacity as Rector of CUT, requested through a letter, which was dated 31/1/2012, that the appellant submit various documents before any offer of appointment was made to him — documents which were never sent to her. According to the defendants, the comments which are contained in a specific paragraph of the Claim Form also did not constitute an offer of appointment. The question of whether or not there had been an appointment is important in determining whether the appellant is entitled to seek an annulment of the revocation by the reviewing Court and in determining whether the first instance Court was correct in ruling that the suit had been premature. If there was no offer of appointment and subsequent acceptance, there could have been no appointment, nor a completed administrative act of an executory nature, such that the appellant could seek the annulment of the revocation of his appointment before the reviewing Court and the jurisdiction of the District Court to adjudicate his claim.

A request under Order 27, s.1, for a preliminary hearing, is granted sparingly and in cases that are extremely simple and clear (see ***X Oikonomou v Hellenic Bank Ltd* (1992) 1 AAD 949**). The ambiguity as to whether or not the appellant was appointed to the position at issue did not, in the present case, allow for the question regarding the jurisdiction of the first instance Court to be heard and decided during the

preliminary hearing. The erroneous judgment of the first instance Court, to rule upon preliminary points raised by the defense, cannot be appealed, even though complaints on this matter were raised via a second point of appeal. This second point relates to the erroneous rejection of the appellant's claim that the case involved contested facts of a multifaceted and complex nature. In his skeleton argument, the appellant's counsel argues that the Court did not follow the due process which ought to have been followed in a case such as this one.

Even though this appeal does not contest the aforementioned aspect of the first instance decision, power is given to the Supreme Court by article 25 (3) of the Law on Courts 1960 (L.14 / 1960) and Order.35, s.8, of the Civil Procedure Rules, provisions which are in essence sequential, to intervene to resolve disputed issues, issuing any order deemed fair and proper on the facts of the case. The parameters of this Supreme Court power were explained in ***Mavronikola v Foniotis et al.*** **(1997) 1 AAD 1659** as follows:

> *«The powers of the Supreme Court during an appeal process are determined by the same statute which grants the right to appeal to the Supreme Court — article 25(3) of Law 14/60 — as well as by the relevant procedural regulations (in this case, Order 35, s.8. In essence, the provisions of article 25 (3) and those of Order 35 s.8 of the Civil Procedure Rules are sequential. In both cases there is a power, inter alia, to issue any order deemed fair and proper on the facts of the case. As was recognised by the English case law which interpreted the legislative and institutional laws of England which correspond to article 25 (3) and Order 35 s.8, the possibility is provided to issue any decision deemed legal, where this can be justified by a change of circumstances that occurred in the interim (See* ***Attorney - General v. Birmingham, Tame and Rea District Drainage Board*** *[1912] AC 788 and Halsbury's Laws of England, 4th Edition, vol. 37, para. 696).*
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> *The approach taken by the Supreme Court of Cyprus has been similar. Important in this area is the decision in* ***Trifonides v. Alpan (Takis Bros)*** *(1988) 1C.L.R. 224 (majority judgment), in which the Supreme Court, despite finding*

that the order of specific performance of the contract by the first instance Court was justified, did not approve the execution of the order, which was suspended pending the appeal, because the rental period had expired. The Supreme Court, however, did not reject the appeal based on this change in circumstances. In such a case, the Supreme Court investigates alternative remedies so as to properly administer justice. In that case, a retrial was ordered to quantify the damages which resulted from the breach of contract, and an order to award compensatory damages substituted the order for specific performance. Related to the same issue, note also the later decision in ***Alpan (Taki Brothers) Ltd v. Tryfonidou et al.,*** *P.E. 8660, date 24.6.1996."*

(See also ***Hadjisolomou Bros Constructions Ltd v A & N China House Restaurants et al.,*** **Civ. Appeal No. 296/2013, dated 22/10/2019**).

At this stage we consider it appropriate to expound on the progress of appeal no. 1057/2012, for the sake of completing the picture of events. The Supreme Court, by a decision on 6/2/2015, rejected the appeal, accepting two preliminary objections which were made by CUT. It held that the appellant lacked a legal interest in challenging the revocation of the decision to appoint him; there had never been a final and enforceable act of appointment, since the plaintiff was never offered nor accepted the position. Furthermore, the appeal constituted an inadmissible simultaneous approval and disapproval of the revocation, since the appellant was involved in the second attempts by CUT to fill the academic position; according to the Court, this implied 'acceptance of the decision to withdraw his offer of appointment. As a result, the plaintiff cannot raise issues concerning the validity and legitimacy of the revocation."

In light of the circumstances of the case, we consider that it is fair and proper to set aside the first instance decision.

The appeal succeeds with the award of € 2,500 plus VAT plus costs. The first instance decision is set aside.

P. PANAYI J

G. N. YIASEMIS J

CH. MALACHTOS J

/SGeorgiou

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[1] Article 172 "The Republic shall be liable for any wrongful act or omission causing damage committed in the exercise or purported exercise of the duties of officers or authorities of the Republic. A law shall regulate such liability. "