The Supreme Court Sitting as the High Court of Justice

HCJ 9060/08

Before:	The Honorable President A. Grunis The Honorable Justice S. Joubran The Honorable Justice U. Vogelman
The Petitioners:	1. Khaled Abdallah Abd al-Ghani Yassin 2. Harbi Ibrahim Mustafa Mustafa 3. Abd al-Rahim Abdallah Abd al-Ghani Dar Yassin
	v.
The Respondents:	1. Minister of Defense, Ehud Barak 2. IDF Commander in the West Bank 3. Head of Civil Administration 4. Police District Commander for Judea and Samaria, Shlomo Katabi 5. Beit El Local Council 6. Beit El Yeshiva Center
Applicants to Join:	1. M.K Zehava Galon 2. The Meretz faction 3. The Ta'al faction 4. M.K Dr. Ahmad Tibi 5. Guy Sagiv 6. David Abudraham 7. Hana Yifat Abudraham
	Application of Respondents 1-4 dated April 27, 2012
Date of Session:	14th of Iyyar, 5772 (May 6, 2012)
For the Petitioners:	Adv. Michael Sfard; Adv. Shlomi Zacharia; Adv. Avisar Lev
For Respondents 1 – 4:	Adv. Uri Keidar; Adv. Osnat Mandel
For Respondent 5:	Adv. Nethanel Katz
For Respondent 6:	Adv. Yaron Kostliz; Adv. Noa Firer
For Applicants to Join 1- 2:	Adv. Omer Shatz
For Applicants to Join 3- 4:	Adv. Osama Saadi; Adv. Amar Yaasin.
For Applicants to Join 5-7:	Adv. Ehud Yelink

Facts

In HCJ 9060/08 petitions were filed with the High Court against the illegal construction of structures on a site next to the Beit El settlement. Following a series of hearings the State notified the court of its adoption of a policy concerning the demolition of illegal

building on private land and the arrangement of construction on State land. As a result of this policy, illegal construction located on private land would be removed. The Court gave a judgment giving effect to the State's undertaking to ensure the removal of the illegal structures within one year of the filing of said notification.

One year later the State filed an application to "renew the hearing of the petition" based on the desire to reconsider the manner of implementing the policy regarding illegal construction on private land. The State's reasons for the application were: (a) that an action had been filed in the District Court concerning the substantive question of the ownership and hence the legality of the structures and the inappropriateness of ignoring the existence of a pending action which was of clear relevance to the demolition order; (b) that the examination of the structures under adjudication in the petition could not be separated from illegal construction in other locations. The policy relating to priorities in enforcement of the law in the Zone should therefore be reconsidered, keeping in mind planning and property aspects and other political, public and operational aspects. The State therefore requested that the court grant a delay to enable the formulation of an updated policy, during which the structures would not be removed.

The petitioners opposed the request, arguing that the State's failure to fulfill its obligation contained in a judgment constituted contempt of court, that there was no procedural proceeding that enabled the opening of a completed proceeding, and that the State's change of position was politically motivated and was not supported on legal grounds.

Held

In his decision of 7 May 2012 President Grunis ruled that there were no grounds for reopening the hearing on the petition. President Grunis ruled that the principle of *res judicata* does not allow the opening of an already completed proceeding. The principle of *res judicata* is based on a number of public interests. It enables the delineation of the borders of the legal proceeding, it assists in clarifying the legal position, it prevents the inconveniencing of litigants with the same legal issue and repeat litigation, and it ensures the proper functioning of the judicial system. From a constitutional perspective, the principle of *res judicata* also reflects the separation of powers between the branches of government in the sense that it signifies the termination of role of the judicial branch in the matter, given that the execution of judgment is a matter for the executive authority.

The President further noted that apart from the *res judicata* issue, the State’s request to open the case also undermined the basic principle of fulfillment of judgments that ensures that the judicial proceeding does not become a meaningless, farcical proceeding, but rather that its results be executed within the time period prescribed by the court. This principle is particularly relevant when the body charged with execution of the judgment is the state. Finally, a change of policy is not grounds for deviating from the principle of *res judicata*, for otherwise the court would be required to reopen proceedings whenever a change in policy was decided on.

Israeli Supreme Court Decisions Cited

[1] HCJ 3267/97 *Rubinstein v. Minister of Defense* [1999] IsrSC 55 (2) 241.

[2] HCJ 7713/05 *Noah – Israel Association of Organizations for the Protection of Animals v. Attorney General* (not reported, 22.2.2006).

[3] HCJ 29/52 S.*A. Shachupek v. Tel Aviv – Jaffa City Council* [1953] IsrSC 7 603.

[4] CA 9085/00 *Shitrit v. Sharvat Brothers Construction Co. Ltd* [2003] IsrSC57(5) 462.

[5] HCJ 9669/10 *Abd el-Rahman Kassam Abd el-Rahman v. Minister of Defense* [2014].

[6] HCJ 7891/07 *Peace Now Movement - Sh.A.L. Educational Enterprises v. Minister of Defense* [2013].

[7] HCJ 306/85 *Kahane v. Knesset Chairman* [1985] IsrSC 39 (4) 485.

[8] HCJ 8887/06 *Yusuf Musa Abd a-Razeq al-Nabut v. Minister of Defense* (not yet reported, 25.3.12)

Decision

President A. Grunis

1. Five permanent buildings and five prefabricated structures which were erected adjacent to the Beit El settlement, on a site known as "the Ulpana Hill" are the focus of this proceeding. In the petition forming the subject of the current proceeding, filed on 29 October 2008, the court was requested to order the execution of demolition orders and stop-work orders issued against these structures. Four hearings were conducted in the presence of the litigants, at the end of which a judgment was given on 21 September 2011.

In the course of clarifying the petition a long series of notifications was submitted to the court by the litigants as well as responding affidavits of the Respondents, after the issuing of *order nisi* in the petition (on 15 September 2010). In the responses of Respondents 1 - 4 (hereinafter: – "the State") it was consistently claimed that the land upon which the structures were built or located was privately owned Palestinian land. Accordingly the Civil Administration issued stop-work orders and demolition orders for the structures. The claims raised by Respondent 6, the Beit El Yeshiva Center concerning the purchase of the land by the settling movement "Amana" were examined by the State and rejected. The State's argument, as raised in the course of the hearings concerning the petition, is that since the structures were erected on settled land registered in the Tabu books, no validity attaches to the purchase claims for as long as the registration has not been altered. The State further told us that no transaction license had been requested for the alleged purchase, and in the absence of such license, the transaction, to the extent that it occurred, is invalid (notice on behalf of the State on 10 January 2010).

2, On 1 May 2011 the State filed a response to the *order nisi* in which it stated that on the 28 February 2011 the Prime Minister had convened a meeting with the participation of senior ministers, the Attorney General and other relevant officials. In this meeting "the foundation was laid for an integrated policy concerning the demolition of illegal building on private land and

regarding the arrangement of construction on State land, so that as a rule, illegal construction located on private land was to be removed". In that meeting it was also decide to take measures for the removal of the structures forming the subject of the petition within a year (response on behalf of the State of 1 May 2011, pp. 4 - 5).

3. Following the notification of the State a judgment was given on the petition, at the end of the hearing conducted on 21 September 2011 (President D. Beinisch, Justices S. Joubran, and U. Vogelman). The judgment anchored the State's notification of 1 May 2011 to the court, and determined the following:

> "We have recorded the State's notification of 1 May 2011 and the notification given to the court today - that pursuant to the decision adopted in a meeting headed by the Prime Minister and additional ministers in the Government, as well as the Attorney General, in accordance with which construction on private land would be removed, as opposed to construction on State land; it was decided that the construction forming the subject of the petition would be removed within one year of the filing of the said notification…. to the extent that the structures are not demolished before then by the possessors thereof.
>
> In this notification the petition has been exhausted and the proceeding was terminated".

Hence, in accordance with the State's notification to the court, which was incorporated into this judgment, the State was supposed to have demolished the structures by 1 May 2012.

4. A year passed from the time of the State's notification being given, but the demolition orders were not executed. Instead, on the 27 April 2012, a few days before the termination of the period for the demolition of the structures, the State filed a notification and application to "renew the hearing of the petition". In the application it was written that "The Prime Minister and a ministerial forum wish to reconsider the manner of implementing the policy agreed upon, and as a result thereof, to also reconsider their specific position of which they gave notice to the Honorable Court concerning this petition" (notification of the State of 27 April 2012, p. 2). The State further noted that the structures earmarked for demolition were populated, with about 30 families resident therein and that a claim had been made by an Israeli body that the area on which most of the structures were erected was actually purchased by him in the year 2000, and that an action had been filed on the matter in the District Court (it will be noted that the action was filed on 19 September 2011, i.e. two days before the decision was given in the current proceeding). The State noted that even though the claims concerning the purchase of the land had already been raised in the past and rejected by the competent authorities in the Civil Administration, nonetheless, it argued that it was not possible to ignore the fact that the proceeding in the District Court was pending. The State further argued that the examination of the structures under discussion in the petition could not be separated from other construction in the settlement of Beit El, that most of which had been erected on private land, outside the current boundaries of the seizure order applied in the area. As such, it was claimed that any decision adopted in relation to the structures under discussion in the petition is liable to influence other building in Beit El and in other settlements, which were similarly built on private Palestinian land. In this context the State attorney claimed that in a series of petitions an undertaking had been given to remove structures in Judea and Samaria area or that the State

had been obligated to do so in rulings of the Court. It was argued, that this obligation had broad implications and it was therefore "decided to reconsider the priorities in enforcement of the law in the area, which along with the planning and property aspects also had consideration for political, public and operational aspects"(*ibid*, p.5). In the framework of the renewed consideration preference would still be given to dealing with construction on private land, but the future of each particular structure would not be examined "from a narrow perspective" but rather in its overall context and having consideration for the "context of the events related to the removal" (*ibid*, p.6). It was further decided to suspend any further act of enforcement in the field until the exhausting of the process of legal clarification underway in relation to the ownership of the land. In order to enable the renewed consideration, the State requested the court to renew the hearing on the petition and to grant a delay of 90 days for the formulation of an updated policy, during which the structures would not be removed. Notably, in the course of the hearing, attorney for the State mentioned a period of 60 days.

5. The petitioners objected to the State's application. In their response the petitioners dwelt on the difficulty of reopening an issue which had terminated in a judgment. They claimed that the State's failure to fulfill its undertaking, that had been included in the judgment, constitutes contempt of court. According to the petitioners not only was there no procedural proceeding that enabled the opening of a completed proceeding, also but that the State had not presented any grounds for opening the proceeding. According to the petitioners the change of position was politically motivated and was not supported up by lawful, legal grounds that justifies the opening of the proceeding in which a judgment had been given.

6. In wake of the State's application to reopen the proceeding, on 6 May 2012 we conducted a hearing in the presence of the litigants in which they reiterated their written pleadings. We examined the pleadings and have found no grounds for acceding to the application to open the proceeding. It is well established that "the point of departure is that once a judgment has been given, the judgment constitutes the final word in the litigation with respect to any additional litigation on the matter forming the subject of the ruling. This is the principle of *res judicata*. This principle is based on the public interest of the public, as well as that of the parties in the proceeding, that court proceedings should be brought to an end and that justice be done with the individual, without subjecting him to additional proceedings by reason of the same grounds or the same dispute" (HCJ 3267/97 *Rubinstein v. Minister of Justice* [1], at p. 244; see also HCJ 7713/05 *Noah – Israel Association of Organizations for the Protection of Animals v. Attorney General* [2] (hereinafter: "Noah case"). Once a final judgment has been made in a litigation, the parties cannot raise any claims, and certainly not claims that were resolved in the judgment (see: Nina Zaltzman, Res Judicata in Civil Proceedings, 3-12 (1991); (hereinafter: "Zaltzman"). The judgment makes it clear to all those involved that the legal proceeding is completed, and that subject to special exceptions all the relevant parties must act in order to execute the judgment and to give effect to the operative result determined therein.

7. The principle of *res judicata* relies on a series of public interests. It enables the demarcation of the legal proceeding; it assists in clarifying the legal situation. It prevents the litigants from being inconvenienced with the same issue and a repeat litigation, and ensures the proper functioning of the judicial system (Zaltzman, pp. 12-15). From a constitutional perspective, the principle of *res judicata* also reflects the separation of powers in the sense that it signifies the completion of the judicial authority's handling of the matter brought before it. The execution of the judgment is no longer a matter for the judicial branch but passes to the executive branch, whether by the mechanism of the Execution Office, or the various government ministries, where it concerns a judgment of the High Court of Justice directed against an authority of the central government.

8. Even though the principal of *res judicata* has a number of exceptions, their scope is quite limited. Hence, for example, already in 1952 Justice M. Landau ruled in HCJ 29/52 S*.A. Shachupek v. Tel Aviv – Jaffa City Council* [3] at pp. 604-605:

> "Nothing comes after the judgment of the High Court of Justice on a matter subject to its authority, and no argument can be heard claiming that a judgment of this court should be vacated because it was mistaken in its interpretation of the law, or in the determination of the facts, or in the procedure for the hearing that it adopted. The possibilities for renewed examination of a judgment of this court are restricted within very narrow borders. In accordance with general principles, a judgment may be vacated when it was granted as the result of an act of deception by one of the parties. This court will also vacate a judgment at the request of a party that was not present during the hearing, if convinced that the party's absence was not his own fault. "

See also in the position of Justice A. Procaccia in CA 9085/00 *Shitrit v. Sharvat Brothers Construction Co. Ltd*.[4], at p.475 according to which:

> "The principle of "*functus officio*" is intended to ensure the finality of hearings and disputes between the parties, with the goal of achieving certainty, legal security, and preventing the parties from being inconvenienced after the completion of their trial. It is also intended to ensure the orderly functioning of the judicial system and preventing its engagement with repeated disputes over matters already resolved, whereas numerous disputes that have yet to be resolved are waiting in line… against the background of these trends, one can understand the narrow and strict boundaries that are permitted by law for reopening a completed legal decision and giving a later decision in the framework thereof. "

9. Apart from the considerations of the finality of the hearing, and protecting the individual litigant's interest that the matter concerning him will not return to be heard in court, there is also the basic principle of performance of judgments. This basic principle ensures that the legal proceeding will not be a pointless proceeding but rather that its result will actually be executed out, within the time period prescribed by the court. Without this basic component the entire legal proceeding is frustrated, especially when the state is charged with carrying out the judgment (in this context see the judgment of Justice A. Procaccia in the *Noah* [2] case, para. 17 of judgment).

10. Examination of the State's claim in its application to reopen the proceedings, in which the ruling was delivered about eight months ago, shows that they contain nothing that justifies deviation from the principle of *res judicata*. The State's arguments do not show any exceptional and unique considerations that would warrant an order for the exceptional measure of "renewal of hearing". The State's principal claim is that the political echelon wishes to reexamine the manner of implementing the policy declared by the State in the proceeding before us, and in a series of additional proceedings (including HCJ 9669/10 *Abd el-Rahman Kassam Abd el-Rahman v. Minister of Defense* [5] and HCJ 7891/07 *Peace Now Movement v. Sh.A.L. Educational Enterprises v. Minister of Defense* [6]). Attorney for the State did not point to even a single legal precedent that supported the State's application to open the proceeding anew. Nor did the State point to any new circumstances that supported its

application. The fact of there being a legal proceeding pending, in which the settlers' claims are being clarified, was already known before the judgment was given (on 21 September 2011). As such, what reason can there be for granting the exceptional relief of reopening a legal proceeding that was heard over a number of years, the central facts of which were not disputed by the State, in which *order nisi* was issued and in which the State's undertaking to act in a particular matter was recorded?!.

It is specifically in proceedings before the High Court of Justice that special importance attaches to the fulfillment of the State's undertakings, and maintenance of the principle of *res judicata.* Accepting the State's position, whereby the desire to reexamine policy constitutes grounds for opening a completed proceeding, could lead to grave results. Policy, by definition, is not static. Is it feasible that each and every time that there is a renewed examination of policy that the State will request to reopen proceedings that were concluded in a judgment. Indeed, a change in policy *per se* is not grounds for deviating from the rule of the *res judicata.* As noted above, the authority to reopen a completed legal proceeding, assuming it exists, is reserved for exceptional situations and circumstances. No circumstances of this nature were show to exist in the case before us, even if it does raise political, public and social questions of a complex nature.

11. It bears emphasis that the fact that the judgment in the petition was given in the form of recording of the State's undertaking and that an absolute order wasn't issued under it, is irrelevant in terms of *res judicata* and the clear and fundamental obligation to fulfill judgments. Indeed, in cases in which the state gives an undertaking to execute any act or to refrain from its execution, the court occasionally avoids issuing an operative order having consideration for mutual respect between the branches of power. However, once the undertaking is included in a judgment, there is an obligation to fulfill the judgment for all intents and purposes. Conceivably, the fact that no operative order was issued may influence the possibility of filing a proceeding for contempt of court, in the event of the non-performance of the judgment (see regarding the possibility of instituting contempt of court proceedings by reason of non-fulfillment of a declaratory order: HCJ 306/85 *Kahane v. Knesset Chairman* [7], at p. 485). This was not the question before us, and accordingly we will not address it.

12. It is for these reasons that we have found no grounds for granting the State's application to reopen the proceeding after judgment was given. Notwithstanding our decision, and in order to enable the State to comply with the undertaking that it gave and which was anchored in the court's judgment, we extend the period determined in the judgment for executing the demolition orders for another 60 days (on the inherent authority vested in the court to extend periods determined in judgments, see HCJ 8887/06 *Yusef Mussa abd-a–Rusak al-Nabut v. Minister of Defense* [8] para. 11 of the decision of Justice M. Naor). Accordingly, an extension is given until 1 July 2012 for the execution of the demolition orders in accordance with the undertaking given by the State in its written response to the court on 1 May 2011 and in the course of the oral hearing on 21 September 2011.

13. As an aside it bears mention that after the State's notification concerning its request to reopen the proceeding was filed, a number of applications to join were filed to the court by M.K Zehava Galon and the Meretz faction, by M.K Dr. Ahmad Tibi and the Arab Movement for Renewal - Ta'al, and on behalf of Guy Sagiv, David Abudraham, and Hanna Yifa Abudraham, three of the settlers in the buildings forming the subject of the petition. We have not found any reason for granting the applications to join. The claims of the Knesset Members and their factions have already been presented fully and completely by the petitioners and their joiner

would add nothing to the hearing. As for the settlers, no reason was given for their application to join, and nor was any affidavit submitted with it. For that reason alone the application could have been dismissed. All the same, on the merits of the application too, the applicants did not explain why they were only applying to the court at this particular stage, and not during the years in which the petition was conducted, and it would seem that insofar as the arguments in their application were brief, they were presented in the hearing both by the State and by Respondent 5.

16. In view of which the application is rejected, subject to that which was set forth in para. 12 above. The State will bear the Petitioners' fees for the sum of NIS 15,000.

Given today, 15th of Iyyar 5772 (7 May 2012).

President **Justice** **Justice**