

CONSTITUTIONAL RULING 0874/2007-R

Sucre, December 12th, 2007

File: 2006-14460-29-RAC

District: Potosí

Reporting Judge: Dr. Walter Raña Arana

In review of Resolution 09/2006 of August 25th, on pages 56 through 59 of the records rendered by the Second Chamber of Criminal Proceedings of the Superior Court of the Judicial District of Potosí, regarding the appeal for constitutional protection filed by Norma Cueto Flores against Marcelino Díaz Ramos, Mayor of Ocurí, alleging the violation of her rights to life, to health, to safety, to freedom of speech, to work and to Social Security established in incidental clauses a), b), d) and k) of Article 7 of the Political Constitution of the State (CPE, acronym in Spanish).

I. FACTS RELATED TO THE LEGAL REQUIREMENTS

I.1. Content of Appeal

I.1.1. Facts Prompting the Appeal

In the petition submitted on August 16th, 2006 (pp. 30 to 32) and the supplementary presented on the 19th of the same month and year (pp. 36 to 37), the petitioner states that on October 24th, 2002 she was appointed as General Accountant of the Mayor's Office of Ocurí, and on April 18th, 2005 she was appointed as Chief Administrative Clerk of said Mayor's Office, a position she served efficiently and responsibly. In June 2005, she became pregnant and duly notified the aforesaid Mayor's Office in order to obtain a prenatal subsidy, which she only received during the months of November and December. However, she did not receive her wages during these months. Consequently, she verbally demanded the payment of these wages on several occasions in view of the fact that, by instructions of the defending Mayor, both the Ministry and municipal government personnel refused to receive her written letters. Despite not having received her wages during this period, she continued to serve her normal duties until January 30th, 2006, when she took prenatal medical leave 45 days prior to delivery, yet she did not receive an in-kind nursing subsidy during the month of January. Following the birth of her child, she failed to receive her childbirth subsidy, equal to the national minimum wage, as well as wages due from November to the date the appeal was filed.

The conditions of her medical leave stated that she was to return to work on April 26th, 2006. However, the defending Mayor requested a face-to-face conversation with the petitioner, which did not take place. Having received no further notice from the authority, she notified the Municipal Council of her return to work in letters dated May 2nd and 3rd, 2006, and the sole response she received was a letter thanking her for her services on May 4th, 2006, which was

apparently drafted on January 26th of the same year. To secure her return to work, she exhausted all administrative appeals in accordance with Law 975 of March 2nd, 1988 without receiving a reply, subsequent to which, this silence was held as a refusal of her request, which is the motive that the petitioner is filing this appeal.

I.1.2. Rights that were Allegedly Violated

The petitioner pleads that her rights to life, to health, to safety, to freedom of speech, to work and to Social Security, established in incidental clauses a), b), d) and k) of Article 7 of the CPE, have been violated.

I.1.3. Authority to which the Appeal was presented and Petition

In view of the foregoing, the petitioner files an appeal for constitutional protection against Marcelino Díaz Ramos, Mayor of Ocurí, requesting that this fact be adjudged as “proven”, and that an order be issued for the return or restoration of her violated rights and for the payment of court costs and attorneys’ fees.

I.2. Hearing and Resolution of the Court of Constitutional Protection

The hearing was held on August 25th, 2006 (pp. 52 to 55) in the presence of the Prosecutor, where the following occurred:

I.2.1. Ratification and Expansion of Appeal

The attorney of the petitioner ratified the appeal in full and expanded it by indicating that having exhausted the ordinary courses of action this represents potentially irreparable damage to mother and child. Despite her client having informed the defending authority of her pregnancy, she was arbitrarily **dismissed** by the authority without any due cause for an administrative law procedure to be initiated. Notice was only given through a letter thanking her for her services.

I.2.2. Report of the Authorities Appealed to

The attorney of the defending Mayor told the Court that the petitioner served in the Municipal Government, but that his client had produced a letter of **dismissal**, which he later revoked calling for her return to her workplace. However, the petitioner never came to the Municipal Government of Ocurí to collect the above, despite having been notified on several occasions. In view of the foregoing, he stated that this arbitrary **dismissal** did not take effect, clarifying that he could provide verification of the above because his client had only just returned to the City of Potosí. He finally requested that the appeal be held as inadmissible and that the petitioner instead come to the Municipal Government of Ocurí to collect the letter establishing the reinstatement of her post.

I.2.3. Resolution

In Resolution 09/2006 of August 25th, on pages 56 through 59 of the record, the Second Chamber of Criminal Proceedings of the Superior Court of the Judicial District of Potosí, in accordance with the opinion of the Prosecutor, granted the protection requested, instructing the defendant to indemnify the petitioner on said day, to settle the childbirth subsidy and all other benefits due under law, and to pay all wages due from November 2005. This ruling was issued on the following grounds:

- a) The petitioner proved that her **pregnancy** was the cause of her dismissal from her employer, since at the end of the period provided as temporary postnatal leave, completed on April 25th, 2006, she was not reinstated by her employer as corresponded to her under Article 1 of Law 975. Furthermore, the obligation to pay a childbirth subsidy was breached as of 2006, and the obligation for the payment of wages was breached from November 2005. In view of the foregoing, it is therefore deemed appropriate to grant the protection requested in view of the acknowledgment of services rendered that was granted by the Mayor's Office of Ocurí and was produced by the petitioner in a letter of January 26th, 2006, notice of which was given to the petitioner on May 4 of the same year.
- b) In reference to the violation of the right to free speech through any medium, the petitioner does not state the manner in which this right was violated by the defendant, and the Court is therefore void of guarantees that attest to this fact.

I.3. Constitutional Court Proceedings

In view of Public Instrument 004/2007 of August 20, the Plenary of this Court instructed that the court deadline be generally extended, with the deadline reinstated through Public Instrument 027/2007 of September 12.

Furthermore, in Special Public Instrument 01/2007 of September 14th, it ruled that the court deadline be generally extended from September 17th of this year, with the deadline reinstated through Special Public Instrument 02/2007 of September 24th.

In Special Public Instrument 03/2007 of October 4th, it ruled that the court deadline be generally extended with immediate effect, with the deadline reinstated from December 4th, 2007 through the Special Plenary of December 3rd. The new deadline was given as January 10th, 2008, and this Judgment is therefore rendered within the term set forth in law.

II. CONCLUSIONS

Following careful analysis of the case, I hereby conclude the following:

II.1. In a letter issued on October 24th, 2002, the petitioner was appointed to serve as Accountant at the Mayor's Office of Ocurí (p. 1). Subsequently, in a letter of April 18th, 2005, the petitioner was appointed to serve as Chief Administrative Clerk (p. 2).

II.2. In the service order of December 15th, 2005, the defending Mayor ordered the disbursement of the prenatal subsidy payment due to the petitioner for the month of October, for the sum of BOB 440 (four hundred Bolivian pesos) (p. 4). This payment was made (pp. 5 to 9).

II.3. The prenatal care certificate issued by the Director of the Polyclinic of Sucre confirmed that the petitioner, an official of the Mayor's Office of Ocurí, received medical care from the fifth month of her **pregnancy** onwards and specified that she was eligible for prenatal subsidy from November 14th, 2005 (p. 10).

II.4. A birth certificate certifies that the child of the petitioner was born on March 12th, 2006 in "Jaime Mendoza" Hospital (p. 13).

II.5. On May 3rd, 2006, the petitioner informed the Chair of the Municipal Council of Ocurí, Francisco Huaranca Vargas, that she would resume her duties upon the completion of her medical leave in a letter that further specified that she had been awaiting the meeting scheduled for April 26th, 2006 in the City of Sucre, which is the reason for which she did not come to the Mayor's Office on Wednesday April 25th. She also claimed that she had not received either her wages for November or the childbirth subsidy due to her since January, thus requesting the payment thereof (p. 14).

II.6. On the same date as the above, she delivered the above letter to the municipal authority, where she expressed her unawareness of the orders issued given that she had not received any document and informed the authority that she had returned to work on May 2nd, 2006 (p. 15).

II.7. In a letter dated January 26th, 2006, delivered on May 4 of the same year, the defending Mayor, Marcelino Díaz Ramos, thanked the petitioner for her services in view of the termination of her employment and the internal restructuring of the institution (p. 21).

II.8. On May 9th, 2006, the petitioner filed an appeal for the revocation of the above with the defending Mayor (pp. 17 and back). On July 26th, 2006, she filed a hierarchical appeal in view of the failure to resolve her request for the revocation of the letter of January 26th, 2006 (pp. 19 to 20).

III. LEGAL GROUNDS OF THE RESOLUTION

The petitioner pleads that her rights to life, to health, to safety, to freedom of speech and to social security were violated based on the fact that despite being fully aware of her pregnancy and the subsequent birth of her child, the defending Mayor announced her dismissal in a letter thanking her for her services, against which she filed an appeal for revocation and an hierarchical appeal, neither of which garnered a response. It is therefore appropriate to review whether the events stated fall within the scope of the protection granted in Article 19 of the CPE.

III.1. This Court established a standard line in case law for the protection of pregnant women and nursing mothers; hence Judgment 0068/2003-R of January 21st, which sets forth the following: “(...) the right that shall be protected is not only the right to work, but also other basic rights of the petitioner and the pregnant individual (...)”, or of the child up to one year after birth; “(...) which need urgent and immediate protection, since the untimely retirement of the petitioner also entails the suppression of his/her right to Social Security, which safeguards and ensures the right to health. The action taken in regard to both of these rights jeopardizes the most basic of rights, the right to life, which cannot hinge administrative appeals or avenues set forth in law. In this respect, Article 193 of the Political Constitution of the State sets forth: ‘Marriage, family and maternity are under the protection of the State’; this constitutional precept is strictly coherent with Law 975 of March 2nd, 1988, which states: ‘All women shall enjoy job immovability in public and private institutions during pregnancy and up to one year after the birth of their child’ (Judgment 0505/2000-R).

(...) in the case in point, the dismissal of the client, as mentioned in the extracted line of cases, constitutes an illegal action that is detrimental to the aforesaid rights, since not only was the petitioner pregnant at the time that the defendants decided to terminate her contract as an official, but a year had not yet passed since the birth of her minor child born on October 4th, 2001, so that even if the petitioner had not been pregnant the defendants would not have been entitled to remove her from her post, just as they were not entitled to reduce her wages or job position (...).”

It is worth explaining this reasoning in two parts, as set down in writing in Judgment 1242/2006-R of December 8th: “(...) firstly, where Law 975 enshrines the right to immovability of pregnant women or nursing mothers of infants up to the age of one year, this makes it implicit that mothers in the condition mentioned have a right for their income to remain unaffected, since the constitutional right to the protection of maternity set forth in Article 193 of the CPE would otherwise not be met; secondly, nursing mothers are protected in the same way as pregnant women, as is reiterated on several occasions in the case law of this Court ‘(...) the legal requirement in respect of the job immovability of the mother up to one year after the birth of her son not only intends to protect the mother’s employment, given the nature of her condition and the rights involved therein, but it also guarantees the means of livelihood for the individual and her child, which require immediate and urgent protection accordingly’ (SC 0780/2003-R of June 11)”.

III.2. In the circumstances set forth, it is clear that the defending Mayor was fully aware of the pregnant condition of the petitioner and of the subsequent birth of her child, in spite of which, when she returned to work upon the completion of her postnatal leave, he served her notice on May 4, 2006 in a letter thanking her for her services, having ignored the appeal for revocation and hierarchical appeal filed by the petitioner to quash the aforesaid illegal decision. By doing so, the defending Mayor committed illegal acts in violation of Article 1 of Law 975, and in violation the petitioner’s right to work and to social security, but not her right to free speech. Furthermore, the

defending Mayor violated the rights to life, to health and to safety not only of the petitioner but also of her newborn child, and we cannot give credence to the statement made by the attorney of the Mayor to the effect that the **dismissal** of the petitioner had been quashed, as no evidence was presented to support the fact that this action had been taken, nor was notice given to the petitioner. In view of the above, it is ruled as appropriate to grant the protection requested by the petitioner.

In view of the foregoing, it is here concluded that, in granting the appeal, the Appeals Court determined the admissibility of the events and the scope of Article 19 of the CPE.

THEREFORE

The Constitutional Court, by virtue of the jurisdiction and competency granted in Articles 19.IV and 120.7 of the CPE; Articles 7 Para. 8) and 102.V of the Law of the Constitutional Court, following review, hereby decides to APPROVE Resolution 09/2006 of August 25th, on pages 56 through 59 of the records issued by the Second Chamber of Criminal Proceedings of the Judicial District of Potosí.

It is ordered that it be recorded, docketed and published in the Constitutional Gazette.

Signed: Dr. Artemio Arias Romano
Justice

Signed: Dr. Silvia Salame Farjat
JUSTICE

Signed: Dr. Walter Raña Arana
JUSTICE