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NO: 16/2008
Office: Civil Appeals Court 5ºT

SENTENCE No: 16/2008
5th Civil Appeals Court
Official Redactor: Dr. Sandra Dam
Signing Officials: Dr. Luis Maria Simon
Dr. Fiorerntino Beatrice
Dr. Sandra Dam

Montevideo, 22 February 2008

HAVING SEEN:
In the disposition of the appeal in the matter of "SASIA, Pablo Javier, et al. v. Central Unit of State Acquisition of Medication and Related Goods (Unidad Centralizada de Adquisición de Medicamentos y Afines del Estado). Writ of Amparo remedy.

RESULT:
That by this decision, which correctly makes appropriate reference to its relationships with antecedents, the appeal was dismissed without any special condemning process.

The complainant appealed to fs. 585, expressing grievances that, at the core and in number, satisfy the characteristics of such procedural action, will be exposed to be considered by the Court.

The transfer was given by the Ministry of Public Health (MSP-Ministerio de Salud Pública) from fs. 634 and by the Executive Power from fs. 652, negotiated.

Upon receipt, the Court affirmed the earlier judgment

WHEREAS:
The Court will dismiss the appeal. The appellant's arguments cannot revert the Court grounds for considering the writ of Amparo inadmissible and ungrounded.

I. To the Court, it is clear that the circumstances/events alleged by the Appellants, which are intended to be protected under the Amparo remedy, not only do not fit the requirements/elements of this exceptional remedy, but also are not able to be substantially proven.

I.1. Considering the amount of time this procedure has consumed and the very large (and unwieldy) amount of evidence produced, this claim cannot be decided in a summary and speedy proceeding like this one. This remedy, as formulated by the legislature, requires an actual or imminent harm [to a Constitutional right] and an arbitrary/illegitimate act committed by the injuring party. So it is unacceptable that evidence of these elements of the action took in this particular case more than 2 months to be produced and consumed 542 folios (until the hearing of the decision in first instance).

The petitioner herself acknowledges in her appeal that what is claimed is "the Judiciary Power protection against a clear and gross attack to a constitutionally protected right."
However, the appellant's actions show that the attack subject to complaint is neither clear nor gross. The large number of testimonies, reports, and expert witness reports added to the case (which to date total 3 files) as well as the time taken to lodge them are not compatible with the process of amparo, as it goes against its very nature.

But, fundamentally, the procedure developed in the case goes against the spirit and letter of the law that created such an extraordinary process, since art. 7 of law No. 16.011 strictly establishes time limits that must be followed for each stage in the process and determines its contents thereof. All combined, the law provides 6 days to apply. Mindful of this, there is no doubt that in this case, there was a gross violation of the legal provision.

I.2 It is worth clarifying that in establishing the admissibility of the appeal, the appellant points out, among other grievances, the distortion of the purpose of the case.

And in several passages of her submission, she states that the assumption in this proceeding is the contravention of the schedule of terms and conditions "...that the present tender process has not complied with the guidelines established in the Schedule of Terms and Conditions that regulates the tender process, so the Administration has acted arbitrarily and improperly "(fs. 609 rvs. et seq)

It seems clear, therefore, that the chosen course of action is not the proper one, so far as it is indisputable that it can never be used to substitute sound administrative decision-making.

And in this case, the Court holds that there is.

If the Administration removed from the recourse of the complainant/appellant the suspensive effect and in doing so based its decision in "urgent needs of the consumers/users, and therefore of human health, causing serious damage," it seems that rather than undermining the right to health, the administrative decision is protecting it.

This conclusion is confirmed by the fact that the complainant/appellant, on several occasions, over the hearing of submissions, indicated the pressing need to take daily doses of medication, which necessarily raises the question of how she, and all those who needed it, would obtain it, if the stay of the award claimed is allowed.

II. Even if the substantial basis of the claim is considered, the result would not change, because the case file reveals that the facts under complaint do not violate, in any of the forms provided by the law (injury, restriction, alteration, or threat), the constitutional right to health as invoked by the appellant, because it has not been proven that the aim of the tender awarded has had, has, or may have that effect.

Specifically, the a-quo points out at the end of paragraph IV: Considering that, "...we have not been able to perceive that there exist substantial differences between the drugs labeled original,

generics, or copies," as was said by medical examiner Dr. Guillermo Lopez, that can produce "serious adverse reactions, much less lethal reactions."

And this rationale is not specifically challenged in the brief stating the bases of appeal .

Thus, there is no merit to conclude that the Resolution 266/007 which awarded the tender "Supply of Antiretroviral Drugs" on the same basis of the previous tender (giving 20% of the original products) (and whose suspension is intended through this remedy) can, in any way, represent a clear and gross violation of the right to health of the appellant/complainant.

Because similar medication has been supplied since 2005, as stated by the Ministry of Public Health, without clinical, immunological, and virological changes as declared Dr. Dutra in fs. 307, although the appellant questioned the importance given to that testimony, she does not detract of its contents with evidence emerging from the process.

III. Therefore, no right has been ignored/misunderstood. And illegitimate actions do not exist.

Because at the time of issuance of the resolution, previous studies of bioequivalence and bioavailability were not obligatory.

In sum, Resolution No. 226/007 did not violate any rule, nor its content harmed (in the form required by Law No. 16.011), any right of the appellant.

IV. The decision that will confirm the a-quo determination having been founded, this Court can not fail to note how completely devoid of style, respect, and professionalism the appellant's management of this appeal was. The fact that she has done her own appraisal of the evidence and that it differed from the findings of the Judge does not legally or ethically entitle her to express herself as she did when referring to the person of the Judge and to the reasons for his decision.

Rightly, at the time of effecting appearance/complying with court orders, and reiterating the concepts also expressed by the Ministry of Public Health in a similar opportunity the Executive Power indicated: "We consider that the complainants/appellants cannot lose the line of what should be the proper behaviour in a legal action because their claim cannot be framed within the chosen procedure to enforce it. The Court has admitted abundant evidence, even more than it is permissible or necessary in the process of amparo. And, because the evidence did not reach the desired goals of the appellants/claimants, they cannot utter expressions such as those mentioned above, which are rude and may even qualify as libelous."

The fact that all those who formed part of this process agreed about the procedural conduct of those who initiated it, is setting, in undeniable form, that this assessment was correct.

Also, without doubt, the appellant's conduct seems to have constituted actions of reckless malice, because they used false means (such as disqualifying professionally and ethically the decision makers) to reach their objective in this instance.

As a result, they will be responsible for legal costs.

Also, and in exercising disciplinary powers according to Article 148, Section 1 of the law No. 15.750, the Court responds to warn the counsel for the appellant to the effect that, in the future development of the profession, observe professional conduct appropriate to the dignity of justice and respect for the Court (Article 5 of the CGP).

For the reasons hereby developed, and attentive to the provisions of the laws cited therein, the Court finds the following:

FINDING/DECISION:
To dismiss the appeal and confirm the decision in first instance.
With costs and expenses to the appellant.
Notational fees: $20, 000; and warning to their counsel.
Notify and return.