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No: 82/2008
Office: Civil Appeals Court, 7th District

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Montevideo, 5 May 2008

VIEWS:
Interlocutory proceeding on appeal this case entitled "Gabarrot, Jorge v. the State Health Services Administration- ASSE - injunction" File no: 2-7/2008, which has come to the attention of the Court in virtue of the appeal filed by the appellant, subsidiary to reconsideration against decision No. 295 of 25/02/08, handed down by the first instance Civil Judge of Second District, Dr. Juan Carlos Contarín.

RESULTING:
(I) The decision on appeal (fs. 90/94) dismissed the measure requested, stipulating the closure of the case without special pronouncement about procedural penalties.

(II) Against that decision the appellant appealed and requested revocation as well as an order imposing ASSE and/or the National Resource Fund, to carry out a medical treatment with enzyme replacement in the dosages determined by the Institute of Nephrology, and under its control, and if disobeyed, a fine equivalent to USD $6,000 a month for twelve months, according to the extensive arguments that must be stayed for the benefit of brevity (fs, 95/100).
In essence, the appellant questions that it has not been given provisional/interlocutory nature to the preventative measure, when without doubt the legislator included it in the injunction process (Article 317 of the General Code of Procedure), that the contradictory process existed since the opposing party appeared (after an order to do so) and filed a deposition, but the order was not fulfilled, whence the appropriateness of applying a sanction to such omissive behavior. The appellant also affirms that the injunction is generally a summary proceeding and what is important is to ensure compliance with the measure ordered unilaterally, as in his/her opinion all what was alleged was proven (a danger in the delay, the need to supply the medication in question) and "attempt a different procedural route involves playing with the patient's life."

(III) Rejected the request for reconsideration, the appeal was allowed (fs. 101).

Raised the case and completed the analysis in question, it was agreed to hand down an early decision. (fs. 102, 103, 104m and et seq; articles 344, 200.1, paragraphs 1, 2 of the General Code of Procedure).

WHEREAS

(I) The interlocutory decision under appeal will be confirmed, because the resolution is shared and consistent with the criteria established by the Court on the key issue of the dispute (Case Nos. 90/00, 120/02, 120/07, 54/08, etc.), according to the fundamentals and details below.

(II) Firstly, the specific relief claimed at the time of lodging the injunction must be analyzed, as it was clarified by request of the Court (fs. 8/9, 27,67, 68), in the sense that it orders the ASSE to provide the necessary medication – Replagal- to treat Fabry disease which afflicts Jorge Gabarrot.

Thus defined the content of the claim, it becomes inadmissible to extend it to include the National Resources Fund as well as the request of coercive measures formulated in the appeal (fs. 88), which clearly becomes time-barred as it was not included in the initial submission, irrespective of noting that as it arises from the summary submitted to complete the documentation (fs. 83), out of court that institution denied the treatment on 16/04/2007, several months before commencing this proceeding, despite the fact that it was not included at the time.

On another note, when the application for a summons is circumscribed, it may well be argued that, as a declaration of intention directed to a certain recipient, it exhausts itself with its own compliance, and is unfit to generate a contradictory process.

However, given the preeminence of substantive rights over adjective rights, and prioritizing the principle of the two-tier court proceedings (Articles 14, 22.3 of the General Code of Procedure), we shall consider the merit of the issue, in the understanding that the guarantee of due process is not violated as was the subject of extensive factual and legal developments, even with the participation of the one affected as indicated by the appellant.

(III) On that basis, as to the legal nature of the anticipatory remedy/decision (injunctive or autonomous), in this case it would become self-satisfying of the merits of the claim, as this Court has previously decided in aforementioned precedents, in the same sense that the a-quo.
As stated there, there is a general precautionary power going beyond individual cases, for which a court can always—against the clear possibility of harm, derived from the delay in the main ruling, being caused—order preventative or protective measures aimed at removing that danger, (Tarigo, Lessons of Civil Litigation according to the New Code, T.II pg. 364, now recognized expressly in Article 317 of the General Code of Procedure). Even when that general power has an instrumental character, as is usual in injunctions, "that is, it is closely linked or directed towards a principal process which results it tries to ensure" (op. cit., pg. 365), doctrine and jurisprudence have recognized the feasibility of self-satisfying precautionary measures, independent of the main proceedings and enduring, without requiring the initiation of the principal proceedings within short time limits (Greif, Litigation Issues, 1st Ed. Cauce 2000, pg. 329).

In principle, the situation of this case can fit into this concept , as long as the defense of a constitutionally protected right is invoked, which is that of health (Article 45 of the

Charter), the initiation of any proceedings is not announced and the remedy requested by this means does not differ from the claim on the merits.

(IV) In this context, the obvious exceptional nature of self-satisfying measures entails the application of strict interpretation criteria and even though it is not necessary to require the existence of an express text forecasting every situation, for it is sufficient to admit the existence of the general precautionary power, the content and purpose of the measure must be analyzed in each individual case in order to decide whether it is self-satisfying or whether the accessory and instrumental criteria should be maintained and ,the initiation of subsequent proceedings required

To these effects, in this case, the measure requested must be resolved according to the specific relief claimed in the statement of claim and there it is literally requested "to order the ASSE to provide the necessary medication – Replagal- to treat Fabry disease which afflicts Jorge Gabarrot" (fs. 67). The plain reading of this request reveals effortlessly that what is requested does not fall under the scope of precautionary measures, which tend to guarantee the outcome of the process and to prevent the recognition of the right of the claimant from becoming an illusion, preventing an eventual insolvency of the opposing party, as expressed in the previous section.

On the contrary, it is a decision about the issue of merit of the principal claim made in advance was is actually requested, as a provisional or anticipated solution (Article 317 of the General Code of Procedure) and the requested anticipation must be justified by proving the possibility of a serious harm or a difficult to repair injury eventuating before the final disposition of the case, or to ensure on an interim basis the decision on the merits according to the provision of Article 317 of the General Code of Procedure.

So, if this is about—provisionally—anticipating the content of the claim so as to avoid harm caused to the claimant if the claim is not satisfied during the time the proceedings last (Abal, Course on General Code of Procedure, Vol. II, pg. 94), this issue cannot be solved by the assimilation to precautionary measures, resorting to the existence of the risk of injury of the legal interest for the duration of the proceedings, but the damage alleged by the claimant must be analyzed taking into account the specific rules referred to above, which require proof of the "plus" in the configuration of serious injury or of injury difficult to redress, as sustained by the Homologous Court of the Second District (LJU No. 14679).

The need to prove the 'danger in delay' for the progress of an injunction, aimed at preventing the eventual insolvency (present or future) of whom may be found liable as a result of the principal proceedings, under the penalty of litigating all the way to the end to obtain a judgment that cannot be executed (instrumentality), is clearly distinguishable from the requirements of Article 317 of the General Code of Procedure to obtain leave to request a provisional or anticipated decision.
In the latter case, the content of the measure is related to the question to be decided by the principal proceeding (hence self-satisfying) and the anticipation requested must be justified by proving the possibility of a serious injury or of an injury difficult to redress materializing before the final disposition of the case.

As argued by Yamgochian-Minvielle (The Injunctive Process. Scientific discussion, RUDP 1965/4 pgs 360, 379 cited by Véscovi in RUDP 1996/2 pgs 183 et seq.): "….if what is guaranteed goes beyond the process, in the substantive law sphere, we are not any longer in a proper injunctive process, but in the sphere of a preventative process. The instrumentality character is absent, as it is susceptible to cause irreparable harm to the opposing party while it is a self-satisfactory measure of the merits of the claim. The protection that realizes the substantive law stated by the claimant (satisfactory), even based on the summary cognition, cannot be defined as precautionary…the self-satisfactory character of the jurisdictional protection has nothing to do with the emergence of collateral estoppel…. Evidently it cannot be defined as of an instrumental characteristic. The anticipatory protection, in contrast to the injunction, beyond the fact that is characterized by its provisional nature, is not characterized by its instrumentality, or better yet, it is not an instrument intended to ensure the utility of the final remedy" (citing Luiz Ghilerme Marinoni, Anticipated Guardianship…in RUDP No. 1/2000, pg. 30 et seq)" (the highlighted are not from the text)

(V) Notwithstanding the above, whatever the position taken regarding the nature of the requested measure, the claimant's claim must fail because we agree with the appealed ruling in that the evidence tendered is insufficient to provide it accordingly.

In the first place, because the argument of the claimant with regards to the effective appearance of ASSE to overcome the hurdle of bilaterality required by Article 317.2 of the General Code of Procedure, -–as the answer to a summons can hardly be included in this concept and when there exist opinions in similar circumstances, such as those of the Supreme Court that in judgment 639/2006 expressed; "…sequence that cannot, in any case, be enabled at the stage when the bilaterality, which is required to reach a decision in these type of cases, has not been completed." (Barrios de Angelis, in Der Course. Procedural IUDP, T. II, pg. 163; Abal, op. cit. pg.80 et seq., 98 et seq.; Martinez Botos, Preventative Measures, p. 52, etc)- is questionably admissible.

More importantly, for the purposes of this decision, the literature on Fabry disease tendered in evidence cannot be ignored; however, regarding the concrete situation of the claimant it has only been produced a simple photocopy of a report allegedly prepared by Dr Francisco Gonzalez in letterhead from the Institute of Nephrology and Urology, Renal Transplant, where it is stated among other details, that he began "an enzyme replacement therapy (Replagal®) a year ago with "an excellent evolution? He has been advised to continue with the medication" (pg. 21) and only during the appeal it was stated that those who receive this treatment have a life expectancy of up to fifty years of age, and the claimant is forty-seven.

In the written submissions, a report by Dr. Balardini is mentioned, but it was not added nor subsequently produced when other documents were tendered (pgs. 10/25, 28/65)

In response to this, the Ministry of Public Health reports that the drug in question cannot be found in the marketplace; enzyme replacement therapies are still emerging and therefore are very expensive, due to this, health systems select those therapeutic procedures that they

have the capability of facing; and in our country, furthermore, by law the Ministry of Public Health transfers the issue to the National Resources Fund, which is said to be done in a brief amount of time (fs. 70).

Given that response, the complainant accompanies expanded documentation and requests the application of penalties for breach of the order made by the judicial recess justice, with a new deadline of ten days; but such documentation consists of literary medical pamphlets about the drug and a fax, which does not clarify who are the senders or recipients, and has a signature that cannot be concretely identified (fs. 83/86, 87)

In this context, even if it is true that the right to health has constitutional roots, the fact still remains that it does not appear that the patient is not being treated at all nor can be proven the life risk summarily invoked late on appeal, and beyond the issue of financial costs, what is relevant is that it cannot be perceived with a degree of certainty the need to be treated specifically with that particular medication, that the alleged benefits were derived from the treatment with the medication, and let alone that the life of the patient depends on it, a matter that was not even pleaded at the time of initiating the claim, but at the later stage of submissions.

In short, contrary to the assertions by the appellant, they have failed to prove the existence of the "strong likelihood of the law" as "standard of proof" to implement measures of the nature invoked here, in terms of the doctrine quoted and mentioned above (Dr. de los Santos, Law Review on Procedure of Provisional Measures, Book I, pgs. 353 et seq., fs. 96).

(VI) According to the guidelines of Article 688 of the Civil Code, penalties for costs shall not be imposed in this instance, as the claimant has been acting reasonably, even thoiugh his arguments advanced to get leave for appeal have not succeeded .

On such grounds and provisions cited above, the Court…

FINDS:
To confirm the interlocutory appeal, without any special procedural costs.
In due course, be returned