DECISION No. 211

Sofia, May 20, 2008

IN THE NAME OF THE PEOPLE

SUPREME COURT of Cassation of Republic of Bulgaria, Fifth Civil Division, at the hearing on the fourteenth of February two thousand and eight, Panel of Judges:

CHAIRPERSON: ELSA TASHEVA
MEMBERS: ELEONORA CHANACHEVA
BONKA DECHEVA

Secretary N. Petkova
In the presence of Public Prosecutor DECHEVA
Chairperson ELSA TASHEVA has reported
On Case № 6087 / 2007

Proceeding is under provisions of Article 218(a), in connection with Art. 218(b), b. "c" of CPC brought by the cassation appeal of T.D.Z. /K./ from the city of S. against decision № 209/1.08.2007, on SCA (Sofia Court of Appeals) civil case № 161/2007, in the part of the amount of compensations awarded for non-pecuniary damages and awarded expenses. Complaint regarding the viciousness of the judicial act is claimed, for breach of substantive law and justification, therefore it is enjoined for its repeal in the appealed parts.

An appeal has been submitted against this same decision, on behalf of Ministry of Health - Sofia; it refers to both - the repealed and condemnation part, and also to the part which has maintained first instance decision. The Appellant maintains complaints regarding irregularity of the judicial act, for breach of substantive law, justification and significant violations of litigation rules, therefore it is insisted that this judicial act has to be repealed entirely in the appealed parts.

Supreme Cassation Prosecution (SCP) representative, as a controlling party, under provisions of Art. 10, paragraph 1 of SMRDA

(State and Municipalities Responsibility for damages Act), expresses an opinion on the cassation appeal merits of Appellant - Ministry of Health, in so far as to keep complaint about unfairly inflated compensation amount awarded for non-pecuniary damage. With regard to the rest of cassation complaints - SCP representative states an opinion on both appeals - considering them unfounded.

Cassation appeals procedures are admissible, because they meet the requirements of Art. 218, in paragraphs 1 and 2 of Civil Procedure Code (CPC) and in consideration of their merits of complaints, the Supreme Court of Cassation found the following: in order to annul the first instance decision, dated November 6th, 2006 on Civil Case № 572/2005 of the SCC, First Civil section, in the part where non-pecuniary damages, brought by T.Z. against Ministry of Health, has been rejected in the amount of over BGN 80 000 to 100 000 and in the part where it is ordered to T. Z. to pay state tax in an amount over BGN 11 940 and instead of this to decree appeal decision, by which Ministry of Health is condemned to pay the additional amount of BGN 20 000 to T. Z., that represents non-pecuniary damages (including statutory interest from February 2nd, 2005) under the terms of Art. 1 of SMRDA, the appellate court has stated law conclusions regarding the viciousness of the judicial decision in this part, because of violation of substantive law, since criteria for fairness are not consistent with provisions of Article 52 of Law on Obligations and Contracts (LOC). In respect of awarded compensation for pecuniary damage in the amount of BGN 960, that represents the value of two injections of Zoladex®, purchased in April and May, 2004, the same as the amount of BGN 540 - that corresponds to three blister packs of Femara®, purchased in January, February and March, 2005, the decisive court expressed an opinion on its legality, as the costs incurred by the Plaintiff have been proven in size and correctly compensated by the First Instance Court. First Instance Court Decision regarding state tax due within the meaning of SMRDA Article 10, paragraph 2 is corrected by the appellate court - instead of awarded amount of BGN 12 740, a lower amount has been set - BGN 11 940, but it failed to award the state fee due for appeal proceedings, an omission that cannot be removed in the present cassation proceedings.

The first instance Court decision has been deliberated as incorrect and corrected by the appellate court also in the part where the Defendant has been ordered to pay Plaintiff expenditures in the amount

of BGN 1 700, which has been reduced to the amount of BGN 431,38, according to the accepted and rejected part of the claim.

In detail and with arguments, the decision-making court has justified the legal conclusions on the implication of Defendant liability for damages to the Plaintiff by the omission of officials in its system. In connection with administrative activities related to the improper Public Procurement Contract procedure (negotiation and supply of expensive medicament), pecuniary and non-pecuniary damages were caused to her, for which compensation is due under provisions of Art. 1, in conjunction with Article 4 of SMRDA. The Defendant's Ministry of Health and its respective officials omission has been ascertained by the determining court, based on evidence of the case and established the following: **first** - **the omission** of one of the basic Public Procurement Contract procedure for the subsequent year, prepared at the end of the previous one – based on the approved specification for annual requirements; **second - delayed** and not implemented procedures, as per Public Procurement Act (PPA), **third** - negotiation for **partial medicament quantities** and **irregular and chaotic supply** of the same - smaller quantities supply compared to the number of cancer patients for the period January 1st, 2004 – March 1st, 2005. This situation had contributed practically to the absence of treatment, respectively to Plaintiff's postponed treatment of her existing disease, that caused disease expedition and development, driving the onset of severe symptoms and the oophorectomy (ovariectomy), which would not have been necessary if the supply, and respective medicament application of Zoladex®, was part of the comprehensive treatment realized for the Plaintiff (who is in the group of high-risk patients) had been regular. On June 10th, 2004, the opinion of the Doctor in charge of Plaintiff's treatment was reflected in patient's private ambulatory file - regarding the necessity to carry out radiation oophorectomy, that was realized from July 13th, 2004 to July 27th, 2004, due to two-month interruption of hormone therapy, in April and May, 2004. Hormone therapy suspension had been imposed due to depletion of Zoladex® medicament, which the Plaintiff purchased under Protocol № 113, dated March 25th, 2003, issued by a SHATO (Specialized Hospital for Active Treatment in Oncology) three-member Commission, until March 23th, 2004. Its supply, provided under the contract concluded between Ministry of Health and "Magined" Ltd., dated February 21st, 2003, and with duration until December 31st, 2003, had run out. After this date, Ministry of

Health showed inactivity, resulting in a delayed Public Procurement Contract procedure for supply of expensive treatment drugs for 2004 country health needs, as according to Ordinance № 23, Appendix № 1, p. 1 to 11. As a result of this delay, contract № РД-17-477/04, for medicament supply (Zoladex® included) had been signed. As a result of Defendant's conduct, medicaments' (among them - Zoladex®) procurement contract had not been signed until April, 2004, with a term up to December 31st, 2004.

In this factual context, and recalling the medical experts' conclusions, the decisive court accepted that because of inconstant supply of Zoladex®, which had been administered every 28 days (and leads to ovarian function cessation) with a reversible required therapeutic effect - if given every 56 days, then the alternative of the treatment with Zoladex® was radiation or surgical oophorectomy, correctly suggested by Plaintiff's doctor in June, 2004, based on the risk of disease progression, in condition of this irregular supply of medicament. However, radiation ovariectomy, performed in 2004 produces cancer induction because not only ovaries are exposed to radiation but also other tissues and malignant tumors are likely to appear. When Zoladex® use is suspended after a performed treatment cycle, abnormalities are detained and ovary function - restored, while with surgical intervention and radiotherapy, ovary function is irreversibly damaged and also other sufferings are likely to appear.

The Defendant's behavior, arising from its omission has caused damage to the Plaintiff due to lack of medicament treatment. The damages consist of pain and suffering, negative situations and physical condition discomfort, that have negatively affected the healing process, so the decisive court, as personalizing the high level of caused non-pecuniary damage has determined, according to the criteria of equity, the amount of BGN 100 000; this compensation is payable under provisions of Article 1of SMRDA. In this sense, the incorrect first instance decision has been corrected, in so far as non-pecuniary damages claim was dismissed for the difference between BGN 80 000 to 100000 and by its appealed decision also the amount of BGN 20 000 had been awarded (including legal interest on this amount, dated February 2nd, 2005).

The rest of the First Instance Decision whereby compensation for pecuniary damages has been awarded is maintained in force.

The Cassation Court considers this appealed decision correct because it is consistent with the substantive law, the legal conclusions are based on clear facts and when stipulated - no considerable violations of the court rules (that require its cancellation or modification) are committed.

Based on cassation appeal of T.D.Z. /T.D.K./ - a change has occurred in the hearing on July 2nd, 2007. In appeal proceedings, cassation argument for violation of the substantive norm (Article 52 of LOC), in conjunction to Article 4 of SMRDA – as the sentenced compensation amount for non-pecuniary damage has been unfairly lowered, is unjust. In order to rule the compensation amount due, the decisive Court has correctly evaluated all circumstances of this concrete case, taking into account Plaintiff's pain and suffering, including officials degree of fault (committed to State financial liability), represented by Defendant - Ministry of Health. Defendant's behavior has been reported as extremely onerous being the one who caused the damage and it was determined by the court that the just amount covers Plaintiff's non-pecuniary damage.

Cassation's argument assignation for state fee (in the amount of BGN 11 940) has been also unfounded and incorrect; this fee is consistent with the provisions of Article 10, paragraph 2 of SMRDA; its amount due for the current cassation proceedings is Plaintiff obligation, according to the Court of Cassation conclusions regarding unreasonableness of her cassation appeal.

Cassation argument that the amount of awarded attorney fee has been in violation of Article 38, paragraph 1, (2) and Article 36, paragraph 2 of Attorney Act, has been also unfounded. The Plaintiff was represented in the case by two lawyers. Legal fees for a lawyer, in the amount of BGN 1 700 (attorney Chechov) have been paid by Plaintiff, consequently, and based on Article 64, paragraph 1 of CPC; only the amount of BGN 431,38 had been awarded, according to granted and denied part of the claim.

Regarding the Ministry of Health's cassation appeal:

Cassation's argument that referred to unreasonable judiciary act is unjust, as the decisive Court had not discussed, Minister of Health order № РД-17-241, dated March 16th, 2004 on contracting procedure opening. The conduct of its respective officials has been deliberated by the deciding court as causing delay and it is treated as an omission that

there is a causal relationship with Plaintiff's damage because of discontinuation of Zoladex® treatment that imposed the radiation oophorectomy procedure, with ensuing grave consequences. As established by the case evidence, it has been indisputable that the Plaintiff had been strict patient, always appeared to examinations and treatment related to her disease (diagnosed cancer in July, 1998). The advent of hormone therapy problems and irregular supply of Zoladex®, Arimidex®, Aromazin® and Femara®, that were decisive for the normal course of patient treatment in order to prevent disease progression, resulted from officials' omission, during the performance of their administrative duties, assigned by the State, through its authority - Ministry of Health, in pursuance of its duty to comply with and help recover the health of the citizens, which this public authority enters into legal relationship with. By their omission, the respective officials who had not assured regular delivery of expensive medicines, have violated their duties towards the state body that appointed them and entered into legal relationship with citizens and in particular with patients suffering cancer, among them the injured Plaintiff, causing her immediate damage. On that basis, the decisive Court has correctly undertaken the responsibility of the public authority, the Ministry of Health in this case, that it is a specific manifestation of the principle of responsibility of the work contracting part, according to Article 49 of LOC, which is also guarantee-protective.

State responsibility is enthroned in the provision of Article 7 of the Constitution of Republic of Bulgaria and of the Law on State liability for damage caused to citizens (1989), renamed in 2006 the Law on the Responsibility of the State and Municipalities for Damages (LRSMD). According to the principle, established in the Constitution and in the Law on Illegal Acts and Actions of Officials (who are private individuals) responsible part is only the State, represented by its State Authority – a legal entity, which is in employment or working relationship with the respective officials, direct cause of injury. In this meaning, cassation arguments for the absence of fault behavior on behalf of Appellant, in respect of which its tenure responsibility is properly liable for guilty official omission are considered unfounded, so cassation appeal should be dismissed.

Guided by the above considerations, the Supreme Cassation Court of Republic of Bulgaria, 5th Civil Division

DECIDES:

To uphold decision № 209, dated August 1st, 2007 on civil case № 161, placed in Sofia Appellate Court 2007 inventory.

CONDEMNS T.D.Z. /T.D.K./, from the city of S., to pay the state fee for cassation proceedings, in the amount of BGN 11 940, under the provisions of Article 10, paragraph 2 of SMRDA.

CHAIRMAN: [signature]

MEMBERS: 1.
[Signature]

2.
[Signature]