National Legal System

No.: 16/2008

Office: 5th Chamber of the Court of Civil Appeals

DECISION NO. 16/2008
FIFTH CHAMBER OF THE COURT OF CIVIL APPEALS
WRITING FOR THE COURT: Dr. Sandra Presa
SIGNING JUDGES: Dr. Luis María Simón
Dr. Beatriz Fiorentino
Dr. Sandra Presa
DISSENTING JUDGES:
FILE NO 2-48356/2007

Montevideo, February 22, 2008

PROCEDURAL BACKGROUND:

The case to be decided is entitled "SASIA, Pablo Javier *et al*. v. National Central Office for the Acquisition of Medicines and Related Items (*Unidad Centralizada de Adquisición de Medicamentos y Afines del Estado*). Protection action[1]." IUE: 2-48356/2007. Case referred by the Honorable 3rd Chamber of the Court of Administrative Litigation, in respect of the appeal of decision No. 8/2007, which appears beginning on page 526 of the record.

CONCLUSION:

This resolution, the accurate relation of which to the facts of the case should be noted, dismissed the claim without ordering any particular administrative penalties.
The claimant appealed, which appeal appears beginning on page 586 of the record, alleging offenses that, in relevant part and insofar as they are related to the characteristics of this administrative procedure, will be dealt with by this Court.
Having received notice, the MSP[2] and the Executive Branch signed off on the lower court's decision at pages 634 and 652 of the record, respectively, leading to the elevation of the matter to this Court.
Having received the case file, this Court has agreed upon its decision.

WHEREAS:

This Court will confirm the decision to dismiss the action, which decision the claimant complains of, given that nothing that the claimant argues in presenting its appeal allows the Court to disagree with the principles that led the lower court to consider the protection action inadmissible.

I. It is also clear to the Court that the situation that the claimants complain of, and which they seek protection from, not only do not fit the profile required in order to make use of this extraordinary remedy, but, far from it, they are not worthy of admission on their merits.

[1] Translator's note: a writ of *amparo*.
[2] Translator's note: el ministerio de salud pública or Ministry of Public Health

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I.1. From a formal perspective, it is enough to consider the time that has elapsed during these proceedings and the voluminous (and occasionally cumbersome) evidence presented and included therein, in order to conclude that a claim such as the one formulated here cannot be resolved in a summary and agile proceeding, which the legislature intended this to be. If the legislature requires that the harm caused by the unlawful action the claimant challenges to be actual or imminent, it is not possible to accept that it take more than two months of proceedings and 542 pages (counting up to the hearing at which the appeals court's decision was handed down) to demonstrate the evidence of such characteristics in the situation at hand.
The claimant itself recognizes that its appeal is "…protection ordered by the Judicial Branch from a clear and serious violation of a constitutionally protected right…"
However, the evidence here shows that the act complained of was neither clear nor serious.
The quantity of testimony, reports, and even expert reports included in the record (which to date comprises three parts), as well as the time it has taken to review them, are in no way compatible with the proceedings of a protection action.
This is because they go against its essential nature.
But, and fundamentally, the proceedings set forth in the record go against the letter and the spirit of the law that created this extraordinary remedy, given that Art. 7 of Law No. 16.011 is determinative, in that it establishes time limits within which each stage of the proceedings must be completed, as well as determining the content of such stages.
And taken together, the law provides six days for proceedings before the lower court.
Taking this into account, there can be no doubt that in respect of the proceedings at hand, this legal provision has been grossly violated.

I.2. It is necessary to specify that in establishing procedures for the appeal, the claimant indicates, among other damages claimed, that the purpose of the action has been distorted.
And in various passages of the claimant's brief, the claimant mentions that the premise of the action is that the terms and conditions have been violated "…the present court proceedings have not fully and faithfully complied with the rules established in the Terms and Conditions that regulate [the action], [and] the Administration has acted arbitrarily and in an abusive manner…" (pages 609 *et seq*. of the record).
It seems clear, as a result, that the chosen action is not the correct one, as it is indubitable that this action cannot be used to appeal well-founded administrative decisions.
And, in the case at hand, this Court believes that the lower court's decision was well founded.
If the Administration itself denied the claimant the suspensory effect of the action, and if in so doing explicitly based its decision on "…the immediate needs of users, and as a result, on human health, causing serious harm," then the administrative ruling would seem, rather than violating the right to health, to be protecting it.
This conclusion is confirmed by the fact that the claimant itself, on repeated occasions throughout the course of its repetitive statements to the Court, notes the immediate need of daily medication, which necessarily leads to the question of how the claimant would obtain such medication, and how anyone who required medication would obtain it, if the effects of the decision were suspended, as the claimant desires.

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II. But even if this Court were to consider the merits of the claim, the result would not change, given that it is equally clear that the acts complained of do not violate, in any form proscribed by the law (harm, restriction, alteration or threat to) of the constitutional right to health that the claimant invokes.
Because it has not been proven that the object of the proceedings has had, has, or could have such a result.
Specifically, the lower court pointed out, in its Whereas Clause IV, that, "…we have not been able to see that there are material differences between those pharmaceuticals referred to as originals, generics, or copies, as court medical expert Dr. Guillermo López has noted, that result in 'serious adverse reactions, much less lethal reactions.'"
This position was not concretely rebutted in the statement of the claim.
That being the case, there is no reason to believe that Resolution 266/007 (the suspension of which the claimant seeks through this proceeding) that decided the outcome of the bidding process for "Provision of Antiretroviral Medications," using the same criteria as the previous bidding process (authorizing 20% original products) could, in any way, represent a clear and serious violation of the claimants' right to health.
This due to the fact that similar medication has been provided since 2005, as the MSP indicated, without clinical, immunological or virological variations, as per the testimony of Dr. Dutra, which appears beginning at page 307 of the record. Although the appellant questions the importance that this testimony was given, there appears in the record no evidence provided by the appellant that contradicts it.
III. There is, therefore, no violation of any right.
Nor has there been any unlawful action that must accompany such violation.
There is no unlawful action because at the time that the resolution was issued, the conditional bio-equivalency and bio-availability studies were not obligatory.
In sum, Resolution No. 266/2007 does not violate any law, and its content does not harm (in the manner required under Law No. 16.011) any of the claimant's rights.

IV. Having come to its decision to confirm the lower court's ruling, this Court cannot fail to note the manner, totally lacking in style, respect and professionalism, in which the claimant has formulated its appeal.
That the claimant should have its own interpretation of the evidence, and that such interpretation should differ from that of the lower court judge, does not give the claimant any right, in terms of standard practice or ethics, to express itself in the manner in which it chose to as regards the person of the Honorable Judge, or the reasoning of his decision.
The Executive Branch correctly noted in its approval of the elevation of the appeal, and reiterating ideas also expressed by the MSP under similar circumstances: "We believe that the claimants may not cross the line from what should be an appropriate legal proceeding for the simple fact that their claim is not within the framing of the process chosen to enforce it. The Court has reviewed abundant evidence. The evidence is much more abundant than what is permissible and necessary in a protection action. And, although this evidence has not resulted in the decision desired by the claimants, they may not employ language such as that previously referred to, which is at best

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disrespectful, and could be considered libelous." The fact that all parties involved in the proceedings have the same opinion of the claimants' conduct leads us to believe, undeniably, that such opinion is accurate.
Also, undoubtedly, such conduct is recklessly malicious, given that the claimant has employed spurious means (such as insulting the professionalism and ethics of the lower court judge) in the hopes of securing a favorable decision.
As a result, the claimant is ordered to pay costs and fees of the proceedings.
In addition, in exercise of the disciplinary authority conferred to it under Art. 148, 1st numeral, of Law No. 15.750, the Court issues a warning to claimant's counsel to the effect that, in the future exercise of his profession, he adhere to norms of professional conduct appropriate to the dignity of the practice of law and the respect due to the Court (Art. 5 of the CGP).

Based on the foregoing considerations, and in keeping with the legal provisions cited therein, the Court

RULES THAT:

The lower court's decision is hereby confirmed.
The claimant is ordered to pay costs and fees.
Notional fees: $20,000 UYU; and a warning to claimant's counsel.
So notified, with case files to be returned.