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DECISION NO. 20/2009
SIXTH CIVIL APPELLATE COURT
OPINING JUDGE: DR. SELVA KLETT
CONCURRING JUDGES: DR. S. KLETT, DR. F. HOUNIE, DR. E. MARTINEZ
Montevideo, February 25, 2009.

CITATION:

For final resolution on appeal, this case is entitled: "Office of the Public Ombudsman v. MVOTMA (the Ministry of Housing, Zoning and the Environment, for its initials in Spanish) *et al*. Preventive action." IUE 32-12/2004, before this Court on appeal brought by the respondents, the MVOTMA and the IMM (the Municipal Government of Montevideo, for its initials in Spanish), respectively, against Decision No. 34, handed down on June 5, 2008, by the Honorable Seventh Civil Court.

WHEREAS:

1) In the aforementioned decision under appeal, which was clarified and expanded upon by order No. 1661, dated June 12 of the same year, the Honorable Judge *a quo* found for the claimant, on the merits, declaring that the respondents had failed to comply with their respective duties to protect the environment, and ordered them to adopt the following measures within a period of six months:

a. To proceed to facilitate the transport and provision of housing for those persons most harmed by the lead contamination (children and their families)—that is, those persons who present with concentrations of lead in their blood of 20 ug/dl, removing such persons from the direct sources of the contamination (the La Teja neighborhood).

b. To proceed to apply, once determined, in their respect modalities and stages, the neutralization or remediation methods for the contaminated soil.

c. If, at the end of the period, the respondents have failed to comply with the aforementioned orders, they will be penalized with a fine of 900 U.R. for each day of delay (pages 897-916 and 921-922 of the record of the proceedings).

2) In respect of this decision, the respondents appealed, arguing, in summary, the following:

a. The Honorable Judge *a quo* did not appropriately evaluate the profuse evidence presented to the court, but instead limited himself to relying on the declarations of two witnesses, which only provided the subjective viewpoints of the persons being questioned. If the judge had correctly weighted the documentary evidence and the related testimony, he would have found that the respondents lacked liability, given that the actions taken by the respondents to reverse or palliate the difficult situation of those persons with high levels of lead found in their blood were sufficiently confirmed by the evidence.

b. The decision contains orders that imply the adoption of actions that are impossible to quantify and to comply with effectively. If the lower court's decision is upheld, there is nothing to protect the respondents from the potential efforts of the Office of the Public Ombudsman to apply the sanctions for failure to comply with the ruling to the State, without taking into account the respondents' degree of compliance therewith, given that the ruling under appeal did not fix parameters with which to measure the degree of compliance with the order.

In this respect, the respondents also note that the subjects of the remediation measures ordered in the ruling under appeal must also be clearly defined, given that the respondents lack the necessary means to determine which persons present a concentration of lead in their blood higher than 20 ug/dl, and such confirmation would exceed the scope of their abilities.

c. The ruling violates the principle of coherence, given that the lower court ignored the methodology suggested by the prosecutor for the solution of the problem, and instead, ordered that

a methodology to be determined by the respondents be applied. Another example of this violation is found in the lower court judge's decision to judge alleged omissions of the respondents that would have taken place in 2004 and 2005, and even later, although no such omissions were plead by the Office of the Public Ombudsman, thereby violating the respondents' right to a defense.

d. The decision under appeal is not adequately supported or reasoned.

e. The fact that the respondents did not cause the damages in question must also must be called into question, taking into account that the damages in fact resulted from the conduct of individual third parties who polluted the soil over a period of many years (pages 929-934 of the record, Municipal Government of Montevideo, and pages 982-996 of the record, MVOTMA).

3) The appeals were properly admitted, with the claimant's representative acknowledging notification of the appeal.

4) Having passed this threshold requirement, the case files were delivered to the Court on 17.09.08, and after the corresponding proceedings, a decision was lawfully reached, and the Court will proceed to hand down its ruling, in accordance with the requirements of Art. 200.1 of the CGP [acronym is not defined in the text, but this likely refers to the Uruguayan Code of Civil Procedure].

WHEREAS:

I) The Court, with the number of votes as required by law (Art. 61, first paragraph, of the LOT [acronym is not defined in the text, but this likely refers to the law governing the judiciary]) rules to overturn the lower court's decision, on the merits, and dismiss the original claim.

II) Facts of the case

In the case at hand, the representative of the Office of the Public Ombudsman, the National Prosecutor for the Third Civil Court, brought a claim against the State, the Executive Branch, the Ministry of Housing, Zoning and the Environment, and the Municipal Government of Montevideo, petitioning the court to declare the respondents liable for failure to comply with their respective duties to protect the environment, and, as a consequence, to order measures to force such compliance.

Specifically, the claimant referred to the lead poisoning suffered by certain inhabitants of the La Teja neighborhood (particularly children), due to the fact that the soil in the area was, over various years, filled with heavy metals and slag from foundries. The claimant alleged that the respondents had not adopted the necessary measures in order to remediate this difficult situation.

As a result of the facts so alleged, the claimant petitioned the court to declare the respondents liable for failure to comply with their respective duties to protect the environment, and, to order the following measures:

a. To proceed to facilitate the transport and provision of housing for those persons most harmed by the lead contamination (children and their families), removing such persons from the direct sources of the contamination.

b. To proceed to apply, in their respect modalities and stages, the neutralization or remediation methods for the contaminated soil as proposed by geologists Campal and Schipilov.

c. To penalize non-compliance with such measures with a fine of 900 U.R. for each day of delay, as calculated from the expiration of the indicated time period (pages 7-29 of the record of the proceedings).

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III) Liability of the respondent public entities. General framework.

Regarding the State's liability, such liability must be premised on the generally accepted principle that Art. 24 of the Constitution of the Republic does not determine those occasions on which the State may be liable, nor provides for objective criteria for attribution, but instead limits itself to upholding the general principle of the direct liability of state entities—and not of state employees—for harm caused to third parties, i.e., the parties who are liable, but not under which situations or conditions such parties may be liable (Cf. Sayagues Laso, E., Treatise on Administrative Law (*Tratado de Derecho Administrativo*), Title I, 8th edition, updated by Daniel Hugo Martins, 2002, No. 456, p. 664).

De Cores holds that there is no conceptual support, neither in Arts. 24 and 25 of the Constitution, nor in the doctrine or jurisprudence relevant thereto, for the resolution—in and of itself and excluding principles of private law, that, for good or ill, represent the result of centuries of legal thought—of the intricate problems that civil liability presents on a daily basis, regardless of the actor who has caused the damage (De Cores, C., "Reflections on the nature of State civil liability" ("*Reflexiones sobre la naturaleza de la responsabilidad civil del Estado*"), in ADCU, Title XXII, p. 403).

For his own part, Sayagues Laso finds that the most appropriate consideration for the determination of when State liability arises is the failure to serve (Sayagues Laso, E., op. cit. No. 456, p. 664), an idea which, as De Cores points out, is based on the jurisprudence of the French State Council, and which Duez explains with the phrase, "the service that does not function, functions at a delay, or functions irregularly" (De Cores, C., op. cit., p. 402).

State liability arises, precisely, as a function of the inappropriate exercise of the State's responsibilities, whether due to a state entity's exceeding its jurisdiction or powers, or by actions taken that are contrary to the normal functioning of the service delegated to such state entity.

Therefore, it is fundamental to keep in mind the applicable legal framework, which regulates the jurisdiction of state entities, in order to determine whether the respondents' actions were unlawful, in the sense that such actions or omissions could be classified as "failure to serve".

As the lower court had the opportunity to state, this Court agrees, in relevant part, with the representative of the Office of the Public Ombudsman in respect of the following premises: 1) Uruguay is governed by a public environmental policy, and therefore the right to a clean environment is considered a public human right (Arts. 7, 72, 47 and 332 of the National Constitution). Beyond the constitutional framework, reference should also be made to the normative framework, including precepts of international law, legislation and regulations, some of which are very long standing, and to which the claimant prolifically cites; 2) The natural consequence of holding the right to a clean environment to be a public human right is the existence of a State duty to protect the environment, which clearly correlates to the subjective rights of the inhabitants of the Republic to have their rights to the enjoyment of a clean and stable environment protected (Sentence No. 92/08 of this Court). To these rights it is necessary to include, in the case at hand, the right to public health and hygiene (Arts. 47 and 332 of the Constitution, Arts. 2, 3, 4 and 5 of Law No. 17.283).

IV) Lack of unlawful acts in the case before the Court

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In the first place, it is necessary to establish that, in the opinion of the Court, and as claimed in MVOTMA in its brief of defense, the two situations made reference to in the claim must be addressed separately.

In fact, from the claimant's own arguments, we can infer that the causes of the lead contamination of the soil in the La Teja neighborhood was not due to any actions of the respondents, but, on the contrary, due to the actions of third parties, consisting in the filling of landfills with heavy metals and slag from foundries, and from the irregular operations of the foundries or metal recycling plants, which were brought into the public eye in 2001, as explained by Dr. Burger in her witness testimony (appearing at pages 595-596 of the record of the proceedings).

As a result, what this Court needs to examine is whether, after the time in which the lead poisoning from soil contamination affecting various persons, and particularly children, in La Teja became public knowledge, the respondents' actions were adequate to deal with the problem, whether they adopted the necessary concrete measures to evacuate affected persons from the area, to clean up the soil, and to provide medical attention to affected persons, despite the fact that this last was not pleaded in the claim.

In consideration of the relevant legal framework and the description of the alleged omissions on the part of the respondents giving rise to the claim, this Court concludes that the administrative activities undertaken, in the temporal circumstances in which context such actions must be judged, were appropriate, and the claimant has not demonstrated that either respondent deviated from the standard to which administrative actions of the State are held; that is, there is no evidence of any unlawful conduct on the part of the State.

This Court, then, does not share the lower court's opinion of the cumulative value of the evidence presented before it, an opinion which led it to conclude that the respondent authorities had failed to comply with their respective duties in relation to environmental protection. In fact, the information entered into evidence, evaluated cumulatively, tends to show, rationally and in accordance with the rules of reasonable judgment (Art. 410 of the CGP), that the respondent authorities, acting with the advice and assistance of other state entities, undertook diverse measures in order to comprehensively evaluate the situation, eradicate or remediate contaminants, and attend to the health of affected persons, which also implied seeking housing and schooling solutions. All of these measures were examined over the course of time.

The most relevant measures that were adopted, as prolifically cited by the Honorable Judge *a quo*, were, among others:

1) Immediately upon learning of the soil contamination, the Executive Branch created an Inter Institutional Commission with the participation of the MSP (the Ministry of Public Health, for its initials in Spanish), the University of the Republic, represented by the Medical School and the Chemistry School, the IMM, OSE (the State Sanitation Department, for its initials in Spanish), ANCAP (the National Fuel, Alcohol and Portland Cement Administration, for its initials in Spanish), MTSS (the Labor and Social Security Administration, for its initials in Spanish), BPS (the Social Security Bank, for its initials in Spanish), ANEP (the National Public Education Administration, for its initials in Spanish) and MVOTMA, in order to address the problem, the *modus operandi* of which was notable for its ability to receive

complaints directly from affected persons (witness testimony of Benedetti, at pages 777 of the record).

2) The respondents sought foreign aid (from the United States of America and Brazil) in order to undertake a comprehensive study that would include a survey of the industrial installations in the area, soil, air and water sampling, and evaluation of housing conditions and the health of local inhabitants, as a direct response to recommendations given by the Centers for Disease Control and Prevention in Atlanta (testimony appearing at pages 596 of the record).

3) Guidelines and protocols were prepared for soil studies that are still currently in use. The Engineering School advised the respondents regarding these studies (testimony of Aguinaga, appearing at page 846 of the record, and Malo, appearing at page 848 of the record).

4) The IMM ordered inspections of various industrial installations in the area, the sealing off of smelting furnaces and other similar machinery, and the precautionary closure of three foundries (pages 100-110 of the record; written affidavits appearing at page 387 of the record; witness testimony appearing at page 591 of the record).

5) The IMM proceeded to divert the Victoria throughway (appearing at page 348 of the record; MVOTMA's complaint pleading new facts, appearing at page 387 of the record; affidavits filed by the inhabitants of La Teja in the protection action, appearing at page 388 of the record).

6) Contaminated soil was remediated using concrete flooring (the so-called "physical barrier") and using a mineral salt called "apatita," which was recommended by the School of Agriculture (witness testimony of Lazo, appearing at page 591 of the record, and Malo, appearing at page 848 of the record). In addition, OSE proceeded to refit some pipes (witness testimony of Malo, appearing at page 848 of the record). Indeed, for these reasons, the MSP's biannual project control initiatives demonstrated a drop in lead concentrations in affected children's blood (page 592 of the record).

7) After MSP carried out the corresponding studies and risk analysis, action was also taken in the Rodolfo Rincon, INLASA and 25 de Agosto neighborhoods, affecting an important number of persons, although some did not wish to be relocated (pages 289 and 297-303 of the record of the proceedings). For some housing, it was not possible to install concrete flooring as a remediation measure. In these cases, rental housing was provided for families in urgent need of relocation, and housing was financed through BHU (the Uruguayan Mortgage Bank, for its initials in Spanish), with a bidding process for construction carried out. Psychological counseling was also provided to relocated families (page 347 of the record and technical affidavits, appearing at pages 592 and 776 of the record).

8) Examinations of lead concentrations in the blood of persons considered to be at risk, including children, pregnant women and exposed workers, were carried out, for which purpose the Out-Patient Clinic for Lead Exposure was established at the Pereira Rossell Hospital, to care for the most seriously affected individuals (see report of the Inter-Institutional Commission, appearing at pages 752 and 755 of the record). The relevant treatments were ordered for affected children, although many children who were given appointments did not appear at the designated health centers, as reported by Dr. Mabel Burger, who added that other children were treated and discharged (page 595 of the record). Engineer Lazo stated that, "the INDA (the National Food Bank of Uruguay, for its initials in Spanish) provided these children with packages including food and milk. The IMM, MSP and ANEP provided vehicles to transport them to Pereira" (page 592 of the record). As set forth in decision No. 92/08 of this Court, the State provides supplementary food assistance to families with children presenting with concentrations of lead in their blood at or exceeding of 20 mg per deciliter of blood (see, also, the highlighted report appearing at pages 693-695 of the record).

9) Informative and educational measures were adopted in order to encourage inhabitants in affected areas to adopt precautionary measures in order to reduce their respective levels of exposure to contaminants, both in domestic matters (including hygiene and food) and in the employment context (affidavit appearing at page 596 of the record). In this respect, the publication included in OPS's (the Organization of Pan American States, for its initials in Spanish) and the WHO's response to the lower court's order is illustrative (pages 792-801 of the record, see in particular, the illustration appearing at page 796 of the record). Both agencies refer to routes of entry that lead can take into the human body and treatments that can neutralize its effects (pages 830-832 of the record). In addition, engineer Lazo explained that the majority of inhabitants of affected areas had come into contact with sources of contamination at work, including burning cables, or working with scrap metals or batteries, etc. (page 592 of the record).

10) Finally, the work of the Commission and of the respondent entities, on their own or in collaboration with other organizations, raised awareness of the problem at the national level, to the point that it became a "routine issue," as Aguinaga stated (page 845 of the record), in respect of which interested parties should also have taken personal and direct responsibility, in strict compliance with the provisions of the Constitution (arts. 41 and 44).

The evidence of these circumstances emerges, in addition to the results already outlined, fundamentally, from: the testimonial declarations of Dr. Mabel Burger (at pages 595-597 of the record), Dr. Nelly Mañay (at pages 597-598 of the record), engineer Maria del Rosario Odino (at pages 598-599 of the record), architect Jose Benedetti (at pages 776-777 of the record), psychiatrist Margarita Irigoyen (at pages 777-778 of the record), engineer Silvia Aguinaga (at pages 845-846 of the record), and engineer Marisol Mallo (at pages 847-848 of the record); and from the report evaluating environmental contamination from lead and its effects on human health, prepared by technicians from the Department of Evaluation of Environmental Quality at DINAMA (the National Environmental Office, for its initials in Spanish), and the Department of Environmental Management at IMM, within the framework of the activities of the Inter-Institutional Commission (pages 696-772 of the record).

In summary, this Court finds that the alleged omission on the part of the respondents in compliance with their respective duties regarding protection of the environment and providing assistance to families affected by lead poisoning, was not only not proven, but, on the contrary, the respondents effectively proved that they have been making significant and sustained efforts to attempt to reverse or palliate the effects of the aforementioned contamination, and which, in the context of the difficulties evidenced in the course of these proceedings regarding solving this problem, do not deserve the sanction sought through these proceedings by the representative of the Office of the Public Ombudsman.

As such, it should be noted that, even after the critical phase, the respondents continued to adopt both preventative and public service measures, such as the assistance provided through the Pereira Rossell Out-Patient Clinic for Lead Exposure, established to assist affected persons in 2001; the Executive Branch's issuance of Decree No. 64/2004, ordering that the Department of Epidemiological Monitoring of the MSP be given mandatory notification of any findings of lead concentrations in blood over 15 grams; and mandatory monitoring of workers exposed to lead and other pollutants (see testimony given by Mañay and Aguinaga, at pages 597 and 845 of the record, respectively, the report of the Department of Environmental and Occupational Health, at page 695 of the record, and the report of the Inter-Institutional Commission, at pages 752 and 755 of the record).

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Finally, it is evident that the majority of the measures requested by the representative of the Office of the Public Ombudsman involve the participation of those persons directly affected, who should, at the very least, manifest—clearly—an interest similar to that of the claimant's (for example, in the transport of inhabitants in affected sectors to other housing, or soil remediation of the land which such persons occupy). In some cases, however, inhabitants in affected areas refused to be relocated (for examples, see testimony at pages 58 to 76 of the record).

In addition, it should be noted that several inhabitants of La Teja abandoned a protection action seeking in part the same measures as sought in the present case, as noted as page 464 of the record. The Court also takes note of the conduct of the parents of an affected girl, who roundly failed to comply with the medical treatment that their child was prescribed (page 576 of the record).

FOR THE REASONS SET FORTH HEREIN,

THE COURT

ORDERS THAT:

The lower court's decision is hereby overturned, and, in its place, the underlying claim is dismissed, without costs.

So notified.

Signed:

Dr. Selva Kitt

Judge

Dr. Felipe Hounie

Judge

Dr. Elena Martinez

Judge

Esc. Raquel Gatti

Court Reporter (Acting)