COURT OF APPEALS IN THE CIVIL, SIXTH TURN.

Judge writing for the court: Dr. Martha Alves De Simas.

Signatory Judges: Drs. Martha Alves De Simas, Marta Gómez Haedo, Cristina Cabrera.

Montevideo, October 11, 2018.

REGARDING:

For the Final Judgment of Second Instance, these proceedings entitled: "British American Tobacco Limited v. Executive Branch, AMPARO", IUE: 2-37586/2018; brought to the attention of the Court on the merits of the appeal filed by the defendant, against the judgment rendered by the Judge of First Instance in the Administrative Court of the 3rd Shift, Dr. Pablo Eguren Casal.

WHEREAS:

1) The contested party, whose list of facts is referred to because it conforms to the act of folios, partially protected the claim and in its merit, suspended the application of Decree No. 235/018 issued by the Executive Branch until the Administrative Court pronounce on the request for provisional suspension of this decree.

2) Against the aforementioned judgment, the defendant, through his Representative, filed an appeal, manifesting in the core:

a) The assertions made in Recitals IV and V of the judgment are mere assumptions of the sentencing party. Neither a specific mention of the damage arises from the impeded demand, nor from the administrative appeals filed, on the contrary, there is only a mere reference without defining what the damage would consist of, nor the approximate figures and, what is even more severe, regarding from what products.

Law 16.011 at no time speaks of irreparable damage, so the damage could never constitute a basis for the ruling.

b) Nor may the referral of a bill by the Executive Branch to the Legislative Branch be grounds for the ruling, given that said legislative initiative has formal motivations and various purposes that led to the approval of Decree 235/2018.

c) The contested decision suspends the application of Decree 235/018 until the Administrative Court rules on the request for provisional suspension.

The assumption is then made that the Executive Branch will not revoke the act, nor will it analyze it, prejudging the damage that will be caused.

The execution of the ruling is conditioned on the conduct of the individual with the obvious legal uncertainty that implies.

d) The amparo action was not considered to be of a residual nature. The delay in the administrative or judicial procedures available to the plaintiff for the protection of its rights is not sufficient argument to promote the claim.

e) The sentence becomes impossible to enforce because the amparo has no *erga omnes* effect but for the specific case and the plaintiff did not identify its trademark title, nor the list of its products. Therefore the Executive Branch, at the same time as it disapplied Decree 235/2018 in its respect, will not be able to make the logical connection between British American Tobacco Limited and a specific tobacco product and presentations of certain tobacco products.

3) Once the appeal had been substantiated, the plaintiff pleaded for the maintenance of the decision in terms of fs. 160 to 171.

4) The appeal granted, the proceedings were received on last October 8.

5) As the Chamber was disintegrated due to the appointment of Dr. Selva Klett as Minister of the Administrative Court, the drawing of lots was carried out, with the assignment falling on Dr. Cristina Cabrera.

TAKING INTO CONSIDERATION:

I) The Chamber, especially composed and by the number of wills required by law (article 61 of the Organic Law of the Judiciary and Organization

of the Courts), shall revoke the first instance decision.

II) The proceeding case.

In the species, BRITISH AMERICAN TOBACCO (SOUTH AMERICA), URUGUAY BRANCH (BAT), promotes amparo action against the STATE, EXECUTIVE BRANCH.

It is based on the fact that the Executive Power issued Decree 235/018 of last August 6, which manifestly and illegitimately affects the constitutional rights of freedom of industry and business and ownership of BAT.

The Executive Power introduced an extremely restrictive regime for the presentation of tobacco packaging, eliminating the use of brands and signs of each company and its full implementation within six months.

The Decree establishes the health warnings that will be used on tobacco product packaging, foreseeing the plain packaging and design of all tobacco products. The Decree grants the Ministry of Public Health the power to determine the shape, color, material, size and design of all packaging and wrappers of tobacco products in its exterior and interior, the text, color, style, size of the letter and the location or position of the legends or inscriptions of the containers.

The cigarette boxes will all be identical, except that the name of the product, written in the same letter, will vary.

The new regime invades reserved areas to the law by the

Constitution itself, prohibits companies producing or selling tobacco products the use of their brands and distinctive signs of each of them.

It is understood that all the requirements of articles 1 and 2 of Act No. 16011 are met in order for the amparo to proceed.

The Decree is an act of the authority manifestly illegitimate and unconstitutional because it invades a reserved area exclusively for the law, limiting the freedom of industry and commerce, and the right of ownership over their brands and signs. Fundamental rights can only be regulated by laws passed by Parliament and for proven reasons of general interest and not by Decree.

There is no other effective way of defense to obtain the same result because the Executive Branch has not responded so far to requests for suspension of the Decree and it will be months before the Administrative Court orders such suspension, when it will be in force and mandatory on February 6, 2019.

The implementation of the Decree is impossible for tobacco manufacturers and importers. Six months is too short a deadline to comply, and BAT will have to withdraw from the market because it can not comply with the provision on time.

The Decree was issued due to the delay in approving the bill sent

to Parliament.

It was appealed on August 27, requesting the provisional suspension. An urgent pronouncement on the request for suspension was required on August 31, with no response.

The amparo action is requested to be granted and, in short, that the application of the Decree be suspended until the Administrative Court pronounces itself on the illegitimacy of the decree or, in its absence, pronounces itself on the request for provisional suspension of the Decree, which will be immediately requested when the contentious annulment procedure is opened.

III) Grievances analysis.

The Defendant is reasonably entitled to feel aggrieved by the judgment.

The amparo action, regulated by Law No. 16011, establishes a summary procedure that is granted to any person, natural or legal, public or private, against any act, fact or omission of the state or parastatal authorities, as well as individuals, who currently or imminently, injures, restricts, alters or threatens, with manifest illegitimacy, any of their rights and freedoms recognized expressly or implicitly by the Constitution.

The amparo only proceeds when there are no other legal or

administrative means to obtain the same result or if they exist, they are clearly ineffective for the protection of the right, as provided in Article 2 of the rule.

The ends outlined must be given in a relationship of complementarity.

As Dr. Luis Alberto Viera puts it: "...in order for the amparo to be appropriate, all of them must concur, in a conceptual structure by which one cannot be understood without the others (see aut. cit. in "*La Ley de Amparo*").

IV) Well, for those of us who have come to this decision, the necessary elements for the admissibility of the claim, in particular, the lack of other effective means for the protection of constitutional rights supposedly threatened by Executive Decree No. 235/018, are not configured in the case.

The proposed factual situation does not fall within the concept of residuality and subsidiarity that must be covered by the claim for amparo.

When article 2 of Law No. 16011 alludes to "clearly ineffective" means, the term may be interpreted in its natural sense, i.e., that the organs of the State, the substantial legislation or the procedural legislation, lack the specific provisions to obtain protection, not the reasonable time that its action may imply.

As the Court has held in previous pronouncements, the promoters had to present "in continenti" evidence that their rights could not otherwise be protected.

Contrary to this, they limited themselves to asserting that other legal mechanisms are ineffective, which is not shared (cf. Sent. 137/2012 in RUDP, 2/2014).

In the same sense, the Homonymous Chamber of 7th Shift has expressed: "...existing natural and available procedural means, they cannot be "bypassed", and therefore it is not appropriate to use a route that is very exceptional and that only operates in defect as the amparo, to claim the same result" (cf. Sent. 10/2013 in ob. cit.).

It should be noted that the plaintiff requested the suspension of the act by way of amparo, when the deadline for the resolution of the administrative appeal of revocation that she deduced against her last August 27 is running (fs. 7 and 8). The plaintiff also requested the suspension of the execution of the decree, which will be applicable as of February 6, 2019, so this way is suspending an administrative act that is not being executed, without giving the opportunity for the Executive for the sake of proper administration, to review its decision.

In turn, once the time limit has expired or the appeal has been resolved, the plaintiff will have an action for nullity in the event that the administrative decision is upheld, and may, at that time, request the suspension of the act in accordance with articles 2 and 3 of Law No. 15869.

In this regard, the Chamber has held: "For these reasons, it cannot be said that the means are not effective in protecting the rights

allegedly violated, because they were not directly attempted. It must be borne in mind that art. 2 of Law No. 16011 refers to the fact that the means for the protection of the right must be "**clearly ineffective**" and no less effective than the measure sought through the means of amparo", (cf. sentences Nos. 166/06, 123/08 and 105/2017 of the Court).

The delay in the processing of jurisdictional or administrative means is not synonymous with inefficiency, so it is not possible to mechanically assimilate the mere delay to the clear inefficiency required by law to make the mechanism of amparo appropriate (RUDP No. 3/97, c. 501, p. 385).

In the event of recourse to an amparo action on account of the delay in the ordinary administrative or jurisdictional means, in violation of the legal framework, the other specific procedural instruments available to litigants for the due defence of their rights would be emptied by absorption (RUDP, No. 3/95, c. 617, p. 436 and Administrative Court Judgement No. 185/2018).

V) In reference to procedural convictions, there are no elements that allow for special imposition at this level (articles 261 and 56 of the General Code of Procedure).

For these reasons;

THE COURT,

Orders the following measures:

1. To revoke the sentence of first instance, dismissing the application for amparo, without special condemnation in the degree.
2. Notify the parties personally. Appropriately, return to the Headquarters of origin.

Dr. Martha Alves de Simas
Jugde

Dr. Marta Gómez Haedo
Judge

Dr. Cristina Cabrera
Judge

Anabel Melgar, notary public
Secretary