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APPEAL AND THE SUSPENSIVE EFFECT WHEN THE ORDER IS DENIED IN A WRIT OF MANDAMUS[1]

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INTRODUCTION

The purpose of this article is to address, in particular, the possibility (if not the necessity) of granting suspensive effect to an appeal in a writ of mandamus, especially when the preliminary injunction has been granted and is revoked by the judgment denying the writ or extinguishing the action.

There are those in our legal system who maintain that it is not possible to grant suspensive effect to an appeal filed in a writ of mandamus. This doctrinal position is supported by a number of renowned authors, although there are no less respected advocates of this opinion who argue to the contrary.

INJUNCTIONS AND WRITS OF MANDAMUS

Article 5º , in its inc. LXIX, of the CF/88 states:

> "A writ of *mandamus* will be granted to protect a right that is not protected by *habeas corpus* or *habeas data*, when the person responsible for the illegality or abuse of power is a public authority or agent of a legal entity exercising the powers of the Public Power."

From the above, it can be seen that the constituent legislator gave the court a remedy of an eminently constitutional nature, guaranteeing, above all, individual or collective rights, when they are liquid and certain.

José Afonso Da Silva, in his wisdom, conceptualizes the *writ* in question as:

> "a constitutional remedy, in the nature of a civil action, made available to holders of a liquid and certain right, injured or threatened with injury, by an act or omission of a public authority or agent of a legal entity in the exercise of an attribution of Public Power".

On the other hand, a liquid and certain right is characterized by being recognized in plain terms, regardless of probative dilation. In this regard, Hely Lopes Meirelles teaches:

> "A liquid and certain right is one that is manifest in its existence, delimited in its extent and capable of being exercised at the time of the application. In other words, in order to be protected by a writ of mandamus, the right invoked must be expressed in a legal rule and contain all the requirements and conditions for its application to the applicant."

Despite the clarity of the constitutional wording, its application to the specific case, put before the courts, does not have the same characteristics, given that the binomial subjective right + objective right is not always compatible. In this case, it is the objective right that must be manifest, visible, "delimited in its extension". It is thus consistent with the individual to whom it is due (subjective right).

However, it is first necessary to know in what way the applicant for the writ of *mandamus* would be imbued with the "liquid and certain right". On this point, the lesson of J.M. Othon Sidou is enlightening:

> "Since the writ of mandamus is granted through a contentious action, in which evidence is inevitably weighed, the liquid and certain right would only be characterized by the decision and not by the act of filing the suit. Thus, the liquid and certain right that authorizes the writ of mandamus is a legal situation for which two elements concur: *subjective*, a duty of the State to provide a certain service, positive or negative; and *material*, a failure to comply with that duty."

However, it should be pointed out that the procedure for filing this constitutional remedy is not consistent with probationary dilation, i.e. the evidence must be pre-constituted, and does not include the subsequent attachment of documents (except for the exception in § 1 of art. 6 of Law 12.016/09 - the Writ of Mandamus Law).

From the moment you officially become aware of the act to be challenged, the writ of mandamus has a limitation period of 120 (one hundred and twenty) days to be filed. It must be addressed to the authority that is the plaintiff and not to the entity, body or any legal entity that the latter represents. According to the new *writ of mandamus* legislation, in its article 24, the legal entity represented by the coercive authority may become a party to the suit through the institute of joinder of the defendant.

Once the arbitrariness or abuse of power has been established, the magistrate may grant an injunction to ensure the right claimed by the applicant, provided that the requirements of *periculum in mora* and *fummus boni iuris* are met. Protecting him temporarily until the final decision on the merits.

Carmen Lúcia Antunes Rocha, when dealing with the legal nature of injunctions in writs of mandamus, states that:

> "The palladian nature of a specific right, which constitutes the essence of the writ of mandamus, makes the preliminary injunction, which can be granted in the preamble phase of the action, an element of the constitutional projection of this institute. Since the purpose of the writ of mandamus is to safeguard a liquid and certain right, in the expression adopted by the country's constitution, all the elements necessary for its composition as an action aimed at that protection are included in its fundamental settlement. From this understanding emerges the preliminary injunction, which makes it possible for the right in dispute to survive until the final decision in the case."

The 2009 Writ of Mandamus Law put an end to a long-standing disagreement as to the duration of the *injunction*, which was 90 days, extendable for a further 30 days, according to art. 1, B of Law 4.348/64. There is currently no specific time limit for its validity, and its effectiveness is guaranteed until the judgment on the merits is handed down (art. 7, inc. III, § 3 of Law 12.016/09).

However, it is possible that, between the time the magistrate grants the preliminary injunction and the time he decides the case, it may be suspended or revoked. For this to happen, there must be determining reasons, justified by a mere order.

It can be lifted as soon as information has been provided by the issuing authority, when it has been shown that the impetrant's arguments do not correspond to the truth, or, in the case of an interlocutory appeal (see Code of Civil Procedure, Law 13.105/15), when the judge exercises the right of retraction.

Once the injunction has been granted, the judge cannot revoke it unjustifiably, or even because he has changed his mind. He can only do so if provoked by the parties concerned.

The judgment denying security must expressly revoke the injunction. These are the most common cases: **a)** the judge is silent on the preliminary injunction; **b)** the judge expressly mentions that the preliminary injunction will remain in force until the MS has become final and; **c)** the judge expressly revokes or annuls the preliminary injunction.

This study will look at the maintenance of the measure *in limine*.

In the case of item "**a**", *if the magistrate is silent about the sentence*, it is clear that he wanted its effects to remain, since it could not be interpreted to the detriment of the petitioner, unless he appealed against the decision.

According to the master Ovídio Baptista Da Silva, this understanding is unfounded, but it is corroborated by Hely Lopes Meirelles, according to the graft launched by the first author:

> "TERESA ARRUDA ALVIM PINTO (Writ *of mandamus against a judicial act*, p. 29) does not accept HELY LOPES MEIRELLES' conclusion, and it seems to us that she is right to consider the injunction revoked if the judge does not expressly uphold it in the judgment. Silence, contrary to what the

> São Paulo publicist suggests, must mean revocation of the measure."

However, in the following statement, the author shows a slight contradiction:

> "Indeed, if the preliminary injunction was granted in a writ of mandamus because its denial could render the future judgment 'ineffective', it is hard to imagine how the judge at first instance could revoke it and thereby render the appeal useless."

Professor Hely Lopes Meirelles is right, however, insofar as the preliminary injunction, once granted, will always be covered by the *periculum in mora*, which, in other words, is nothing more than the risk or danger of delay in the effective provision of justice. Logically, considering the possibility of the future decision becoming "ineffective" if it is not granted *in limine*.

Therefore, there is no other way to interpret the court's silence. It must be interpreted according to the *in dubio pro* impetrante technique *in* favor of maintaining the injunction once granted, because, as will be explained below, there is a strong tendency to consolidate a firm position that it is forbidden for the judge to revoke the injunction at the time of the judgment on the merits.

In the case of item "**b**", if there is *mention of the continuation of* the *preliminary injunction*, it would last until the final *and* unappealable decision, which may occur immediately, if no appeal is filed, or at the last instance, when there is no further appeal to be filed.

The final hypothesis described in item "**c**" is the subject of fierce controversy in academic circles and in Brazilian doctrine. According to some scholars, *the express annulment of the preliminary injunction* is valid in the judgment on the merits and the party that granted the security, in order to protect the right previously invoked until the decision of the *ad quem* court, must request that the suspensive effect be granted in the Appeal, which, under the terms of art. 800, sole paragraph of the CPC, must be done by filing a precautionary measure before the higher court.

On the other hand, other authors argue that the judge could not revoke the preliminary injunction during sentencing, precisely because his decision is not yet final, since it can be appealed and reviewed, as will be explained in the following topic.

WRIT OF MANDAMUS AND APPEAL

According to Nelson Nery Junior, the appeal against a judgment on the merits handed down in a writ of mandamus must be considered only in its return effect, and he states in relation to the injunction that:

> "...even if the judge does not expressly state so in the judgment, if the injunction is denied, it is *ipso facto* revoked, because it is incompatible with the judgment. STF 405 applies by extension."

However, there are those scholars who agree that appeals should be given suspensive effect and deny the validity of the current Supreme Court Precedent 405.

In this vein, Cassio Scarpinella Bueno, Hely Lopes Meirelles, Ovídio Baptista Da Silva, Hugo De Brito Machado, Luiz Guilherme Marinoni and Alcides De Mendonça Lima, among others, follow suit. Mendonça Lima also adds:

> "... the appeal against the judgment denying the writ of mandamus must be received in its suspensive effect, and it is certain that this suspensive effect represents the suspension, even, of the decision revoking the injunction"

This understanding completely invalidates Precedent 405 of the Federal Supreme Court, which, in essence, states, under the previous Procedural Code, that if the writ of mandamus is denied by the sentence or in the judgment of the interlocutory appeal filed against it, the

injunction granted becomes null and void, with the effects of the contrary decision being retroactive.

The refusal to agree with Precedent 405 of the STF is justified because in view of the new system of appeals and considering the evolution of doctrinal understanding about the legal nature of the injunction, added to the fact that the judgment on the merits in the *writ of mandamus* has suspensive effect, which was previously not allowed, it is no longer possible to retroact the effects of the contrary decision, invalidating the injunction or any act practiced during its validity.

However, it is worth noting that the aforementioned precedent has not yet lost its validity, much less been revised by the STF, even though it is not currently applicable.

APPEAL AGAINST A JUDGMENT REVOKING A PRELIMINARY INJUNCTION AND ITS SUSPENSIVE EFFECT

Once the appeal has been filed, the question arises as to whether the magistrate should accept the appeal filed in this constitutional remedy, in the face of the decision denying security, or even extinguishing the case without judgment on its merits, revoking the preliminary injunction previously granted.

It is abundantly clear that the MS appeal should be given double effect, i.e. it should have a devolutive effect as well as a suspensive effect. This understanding is followed by the best doctrine and the most recent ideas in appellate theory.

Certainly, this reception in its double effect is intended to avoid any ambiguity, distortion or misinterpretation regarding the admissibility of the appeal. Thus, the express expression of the scope of the suspensive effect in relation to the injunction that has been overturned must be clear, so that it can undoubtedly persist until the final decision, when the appeal is granted and the security is granted, and the right *in limine* is not harmed.

Now, once the preliminary injunction was granted in the *writ*, it was certain that the *lower* court saw, above all, the presence of the "smoke of good law" and the "danger of delay", even if the security was later denied in the judgment.

However, the judge would not be making the most appropriate judicial assessment of the petitioner's request if he were to deny the security, or even if he were to dismiss the case, considering the principle of the double degree of jurisdiction, since his decision has not become final, much less immutable.

If, at the time of the decision, the judge does not confirm the *fumus bonis iuris*, this does not mean that it does not exist completely. This is precisely why the higher court has the power to review the decision *a quo* and modify it where appropriate. This imposes due care, because it would be incongruous to grant a preliminary injunction only to then cancel it on the merits and, without the presence of the suspensive effect, recognize it later in a judgment. In this way, it would be ineffective to provide due protection by not applying the danger of delay in this interstice (decision *a quo* / decision *ad quem*).

In short, since the decision of the first degree of jurisdiction is not final, it is clear that if an appeal is lodged, the security first denied may be granted at a higher court.

Even more evident is the case in which the security is not denied, but the case is merely dismissed without judgment on the merits, especially in cases where the judge considers that further evidence is necessary.

Therefore, it is clear that, if there were the possibility of the Appeal not being allowed in its suspensive effect, there would be, vis-à-vis, a difficult or irreparably damaging condition for the party, since if the appeal were allowed, the right *in periculum* would be irreversibly compromised.

Cassio Scarpinella Bueno says that once the preliminary injunction has been granted in a writ of mandamus, one cannot even imagine how the judge of the first degree could revoke it and, through this, render the appeal useless, but if he did, that is, revoked the preliminary injunction in judgment, he should first receive the appeal in its suspensive effect and apply it in relation to the preliminary injunction, giving it validity, at least until its final judgment.

Further on, the aforementioned author, inspired by the doctrine of Ovídio Baptista Da Silva, states that:

> "Preliminary injunctions must remain effective even if the judgment on the merits dismisses the action; Just as, in principle, the measure decreed or confirmed in the final precautionary judgment must remain effective even if the judgment in the main proceedings rules against the party who obtained the precautionary protection, neither can the right in dispute be left without any guarantee of protection during the appeals process, which in many cases takes an extremely long time, so that the reform of the judgment in the higher levels of jurisdiction could be faced with a situation of irremediable damage to the right only now recognized on appeal."

In the same vein, Luiz Guilherme Marinoni teaches that in the writ of mandamus:

> "The revocation of the preliminary injunction when the judgment is handed down is innocuous, since it (except in the exceptional cases of article 520 of the CPC) is subject to an appeal to be received and processed with suspensive effect. For the revocation to be effective, it must be done before the case is sentenced, by issuing an interlocutory decision"

In the same vein*, a decision of* the Superior Court of Justice admitted that a preliminary injunction in a writ of mandamus can be upheld, even though the final decision denies it:

> "Writ **of mandamus. Tax matters. Maintenance of preliminary injunction in another writ of mandamus, granted by means of a fiduciary guarantee, later revoked, with denial of the order. Inapplication of Precedent 405 of the STF.** I - Once the assumptions authorizing the preliminary injunction have been configured, the applicant has a subjective right to obtain it, especially in tax matters, if its granting is conditional on the prior provision of a guarantee, which has been duly met. II - Precedent 405 of the STF, approved under the old Code of Civil Procedure, is no longer in line with the principles and concepts relating to precautionary measures, the aim of which is to ensure the effectiveness of a decision on the merits. III - Ordinary appeal granted (RMS 1.056-0. Ac. da 2ª T. do STJ, de 06.09.1993, pub. No DJU, I, de 27.09.1993, rel. Min. Antônio de Pádua Ribeiro).

FINAL CONSIDERATIONS

For all the above reasons, it must be concluded that the writ of mandamus admits a preliminary injunction, when its admissibility requirements are present, with the magistrate being able to revoke it after the coercive authority has provided the necessary information or at the request of the *Parquet* Body, when it no longer sees those requirements, or because it has been misled by the petitioner or even by the evidence produced with the petition.

Despite the fact that there is still considerable disagreement, the doctrine of the inadmissibility of revoking a previously granted injunction at the time of sentencing must be supported. If the court sees fit, it must do so during the course of the *mandamus*, by a duly reasoned interlocutory decision, if provoked by the interested party or the Public Prosecutor's Office.

In the event of an appeal being lodged, the judge should expressly state in the judgment that the preliminary injunction is effective until the final decision. In this way, any

damage to the plaintiff will be avoided if the injunction is definitively granted, recognizing his right to a fair trial.

If they do not expressly do so, it will be assumed that the injunction remains fully valid, without revocation, as explained above.

If the court of origin expressly revokes the preliminary injunction, it would be obliged to grant suspensive effect to the appeal, in order to safeguard the right once protected by the injunction, *in* view of the possibility of ineffectiveness or damage that would be difficult or impossible to repair.

In the above case, it is recommended that the judge expressly declare the extent of the suspensive effect granted to the injunction, specifying its permanence until the final decision in the case, once the inapplicability of Precedent 405 of the STF, which has long been superseded, has been proven.

If this does not happen, it will be up to the aggrieved party to file a precautionary measure before the competent court for review at the second level of jurisdiction

If this is not done, it will be up to the injured party to file a precautionary action with the court competent to review the case at the second level of jurisdiction, as soon as the appeal has been filed with the court of origin. The appointed rapporteur will immediately grant a new injunction or give the appeal suspensive effect, establishing jurisdiction to hear the appeal when it is distributed before the *ad quem* court.

Finally, the suspensive effect of an appeal in a writ of mandamus should be allowed, extending to the preliminary injunction, whenever there is a possibility that the right will suffer damage that is difficult or impossible to repair, otherwise the eventual granting of the appeal will become innocuous.

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