

Court of Justice of the State of São Paulo
Judicial district of São Paulo
Central Courthouse – Public Treasury/Accidents
6th Public Treasury Court
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Interlocutory Order

Procedure number: **1047315-47.2020.8.26.0053 - Produção Antecipada da Prova (Early Production of Evidence)**

Applicant: **Clara Leonel Ramos and other**

Defendant: **Public Treasury of the State of São Paulo**

Judge: Hon. André Rodrigues Menk

Reviewed.

CLARA LEONEL RAMOS and **BRUNO DE ALMEIDA DE LIMA** filed the present autonomous claim for the early production of evidence against the **STATE OF SÃO PAULO**, based on article 381, item III of the Code of Civil Procedure, in order to gain access to documents related to the “Programa IncentivAuto”.

On page 190, the plaintiff was directed to file a statement regarding the right of action, as well as the Public Treasury was directed to file a statement regarding the content of the information requested.

The plaintiff filed statements - pages 193/197 -, proving the prior administrative petition.

Served with process, the State Treasury filed statements - pages 222/233 -, arguing the lack of legal prerequisites and of conditions for legal claim, generic claim and, on the merit, argued for the confidentiality of the information requested by the plaintiff.

The plaintiff filed statements – pages 942/949.

Having made a brief summary. I DECIDE.

Firstly, I state that the early production of evidence, whose procedure is set forth on article 381 to 383 of the Code of Civil Procedure, does not foresee the *audi alteram partem* between the parties, in fact for said procedure, the Judicial Power does not render judgment on the occurrence or not of the fact, nor on the respective legal consequences.

It is, therefore, a procedure that seeks solely the production of filed evidence, which must be view and appraised in the future on the respective action where it comes to be used.

This, however, does not rule out the possibility of *audi alteram partem* concerning the right to the evidence itself, as in the present claim.

After all, the right to be heard - *audi alteram partem* - and of due process are both constitutionally assured on article 5, item LV.

What cannot be allowed in this claim is the discussion about the content of the evidence, or even its legal consequences, since, as previously determined, it must be the object of review and appraisal during the respective future action where it comes to be used.

Fair enough.

In the hypothesis of the claim, the plaintiff's request is based on the text of article 381, item III, of the Code of Civil Procedure, *in verbis*:

*Art. 381. The early production of evidence shall be admissible in cases in where:
(...)*

III – prior knowledge of the facts may either justify or avoid the filing of the suit.

According to the plaintiff, the documents requested in the present claim are necessary for the knowledge of the facts that may come to support or avoid the filing of popular action for the annulment of the acts of the IncentivAuto Program that are harmful to the public coffers and to the environment, because they do not respect the current legislation for fighting the effects of climate change.

Thus, and considering the now analyzed context itself, one cannot even consider the alleged lack of standing argued by the State, now defendant.

After all, contrary to the stated by the State, the plaintiffs of the present claim, as citizens, have active standing for the filing of eventual popular action, under the terms of article 1 of Act number 4,717/65:

Article 1 – Any citizen will have standing to claim the annulment or the declaration of nullity of acts harmful to the assets of the Government, Federal District, States, Cities, agencies, joint-stock companies (Constitution, article 141, Paragraph 38), mutual insurance companies where the Government represents the absent policyholders, public companies, autonomous social services, institutions or foundations that for their creation or funding the public treasury has contributed or is contributing with more than fifty percent of the assets or annual revenue, companies incorporated to the assets of the Government, Federal District and Cities, and any legal entities or companies subsidized by the public coffers.

First paragraph – Are considered as public assets for the ends mentioned in this article, the assets and rights with economic, artistic, aesthetic, historic or touristic value.

I REJECT, therefore, the request for preliminary dismissal based on lack of legal prerequisites and of conditions for legal claim.

Regarding the allegation that the claim is generic, characterizing a fishing expedition, the State Treasury has partial reason.

Fishing expedition is characterized, in a brief summary, by the means for evidence gathering that are, in fact, merely speculative or random exploratory illegal investigations, also known as survey measures.

In short, it is the hidden intention of one of the parties, by means of threats or the actual filing of baseless claim, to have access to information they normally wouldn't have, if not through unfair litigation.

In order to avoid such behavior, with the effective judicial control over measures and evidences requested by the parties, the right to evidence cannot be considered as something completely disconnected from what is potentially demanded through the filing of eventual claim directed to the declaration of the right.

In a nutshell, in order to not allow unfair behavior, the Judicial Power must determine if the evidence filed is intrinsically related to the right *in abstracto* that one will seek to protect in an eventual future demand.

It is right that it befalls to the interested party the responsibility of demonstrating the purpose of the evidence, under the terms of article 382, of the Code of Civil Procedure:

Art. 382. In the motion, the plaintiff is to present the reasons that justify the need for the early production of evidence and precisely state the facts on which the evidence rests.

In this respect, contrary to the stated by the State requested, the plaintiff was successful in adequately demonstrating the pertinence and the logic correlation between documents it aims to gain access to through this claim and the right it endeavors to protect in eventual future popular action, with the exception of the documents requested on item 2, pg 13 – pg 10 of the English version -, of the complaint (*“Documental evidence of the analyses and reports prepared within the sphere of the Evaluation Committee of the Economic Development Policy of the State, the State Treasury Office, Guidance Council of the Fund for the Support of Taxpayers of the State of São Paulo (CONFUNAC), the Investe São Paulo - Paulista Agency for the Promotion of Investments and Competiveness, or any other body of the Government of the State of São Paulo”*).

With effect, the documents requested o item “2”, pg 13 – pg10 of the English version – of the complaint, reproduced above, are too generic, the plaintiff not being able to adequately demonstrate the correlation between said evidence and the right it endeavors to protect in eventual future popular, which, according the plaintiff itself would aim to, in theory, annul acts from the IncentivAuto Program that are harmful to the public coffers and to the environment, for not respecting the current legislation for fighting the effects of climate change.

The other documents requested on items 1, 3 and 4, pg 13 – 10 of the English version – of the complaint, on the other the hand, hold correlation and logic pertinence to the object of the right to be protected in eventual future action, therefore, not demonstrating the generality of the plaintiff’s claim, or even the so called “fishing expedition”.

Thus, **I ACCEPT** the preliminary argument of generic claim only with regards to the documents requested on item “2”, pg 13 – pg 10 of the English version -, of the complaint.

Lastly, to what concerns the confidentiality of the documents, the State Treasury has no grounds.

As is well known, publicity is one of the express Public Administration principles set forth by article 37, head provision, of the Federal Constitution.

Therefore, it is understood that the publicity of acts and documents is a rule, being the confidentiality cases the exceptions in the legal system.

One does not ignore the fact that the documents requested by the plaintiff may contain information effectively covered or by industrial confidentiality, protected by the Agreement on Trade-related Aspects of Intellectual Property Rights or even by tax secrecy (article 198, National Tax Code).

As it happens, however, even in such occasions, one must favor the access to non-confidential information, as can be surmised from article 7, paragraph 2 of Act number 12,527/11, *in verbis*:

“Paragraph 2 – When full access to the information is not authorized due to the fact that it is partially confidential, it is ensured to the party access to the non-confidential part by means of certificate, excerpt or copy with the redaction of the confidential part.”

Were that not enough, one must assert the literality of the determined by article 7, items VI and VII, a, of the same act, entirely fitting to the hypothesis of the claim.

“Article 7 – The access to the information which this Act deals with includes, among others, the right to obtain:

(...)

VI – information pertinent to the administration of the public property, use of public resources, public bidding, administrative contracts; and

VII – information pertaining:

a) To the implementation, monitoring and results of programs, projects and acts of public bodies and entities, as well as to the proposed goals and indicators;”

In light of the foregoing, therefore, and considering that, in the case of the claim, the State Treasury has already been dully served with process, **SERVE** the State of São Paulo with the order to, **within 30 (thirty) days**, present the documents requested by the plaintiff on items 1,3 and 4, pg 13 – pg 10 of the English version-, of the complaint.

In case of confidential information among such documents, will befall on the defendant to present the documentation, under the terms of the aforementioned article 7, paragraph 2, of Act number 12,527/11.

Serve with process.

São Paulo, January 12, 2021