

JUDICIAL BRANCH
COURT OF JUSTICE OF SÃO PAULO

ORDER

Writ of Mandamus nº 2271462-77.2015.8.26.0000

Rapporteur: Xavier de Souza

Tribunal: 11st Chamber of Criminal Law

Petitioner: WHATSAPP INC.

Defendant: LAW JUDGE OF THE 1st CRIMINAL COURT OF SÃO BERNARDO DO CAMPO COUNTY (34428)

Case record examined.

This case is about the Writ of Mandamus petition with the purpose to reverse, ex parte, the order issued on the records of the Telephone Interception procedure nº 0017520-08.2015.8.26.0564 (control nº 1449/2015 - injunctive relief) to temporarily suspend the activities of the app operating under the name *WhatsApp* for the period of forty-eight hours, in all national territory.

The plaintiff argues that the criminal procedure opened on the judge of origin assess the practice of drug trafficking. The police authority required the wiretap order, through the WhatsApp application used by three investigated individuals. A Brazilian and two Paraguayan lines. After a opinion from the Public Attorney's Office the judge determined the interception, as required, determining *Facebook* of Brazil to comply with the order.

The company *Facebook* informed the impossibility of complying with the legal order. Following that, the judicial authority imposed a fine to *Facebook*, to compel it to comply with the Interception order. In virtue of the company's inertia, the judge determined the suspension of the *WhatsApp* application activities, represented in Brazil by *Facebook*, for the period of forty-eight hours.

The subscribers of the complaint plead that the accepted judicial decision is illegal, for a) with the pretext to investigate three telephone lines, it withdraws millions of users, including public utility services; b) it did not notify the petitioner to comply with the judicial order, which was possible through the international judicial cooperation; c) violated the *Marco Civil da Internet*¹ (Federal Law nº 12.965/14) and the Decree nº 3.810/2001.

¹ Brazil's Internet Bill of Rights

The Attorneys invoke the violation to the principle of proportionality, because, with the pretext to Intercept only one Brazilian telephone line, millions of users all over the country were affected by the decision, leading to burden people who are not directly connected to the criminal investigation. They argue that the content of the decision transcends the Brazilian territorial space, since users around the world are unable to communicate with any *WhatsApp* user in Brazil.

The subscribers of the complaint continue on to sustain the occurrence of mistake when equating *Facebook* to *WhatsApp*, affirming that in face of these misconception there was not the notification of the second company, which constitutes a distinct legal entity from the first, supporting also, once more, on Federal Law 12.965/14, known as *Marco Civil da Internet*.

To finish, the plaintiff speaks of the risk of irreparable damage to tens of millions of Brazilians, postulating, in consequence, the granting of preliminary injunction with the purpose to suspend the decision fought.

It is the report of the essential.

The question here holds similarities, with the necessary adaptations, with another case object of the judgement on the Writ of Mandamus nº 2221910-46.2015.8.26.0000, realized on 12.9.2015, in which I also figured as Rapporteur.

And, independently of the discussion about the companies nominated in the complaint being distinct, to be confronted in an opportune time, what is relevant now is to know if the judicial order should persist or not, as it has been released.

Under this aspect, in face of the constitutional principles, it is not reasonable that millions of users are affected in result of the petitioner's inertia, foremost when other available means to obtain the desired result were not exhausted.

The judge quotes that as the imposed coercitive fine did not succeed, it led to the adoption of the extreme measure.

But it is possible, always respecting the conviction of the authority listed as co-actor, the raise of the value of the fine to a level enough to inhibit the eventual resistance of the plaintiff, solution that, apparently, was not adopted in its origins.

Therefore, **I grant, in part, the preliminary injunction, to repeal the decision of fls. 23/26, in what relates to the temporary suspension of activities of the app operating under the name *WhatsApp***, until the judgement of the merits of this heroic remedy, the judge of origin should immediately provide the expedition of official letter to the providers to which the order was released, giving them the knowledge of this order's contents, with a resulting reestablishment of the affected services.

A more in-depth discussion is reserved, by the occasion of the judgement of the writ of mandamus, about the issues related to the legitimacy of the petitioner to be the target of the measure postulated by the Public Attorney's Office in first instance.

It is processed, requiring information and notifying the Public Attorney's Office.

A copy of this decision should be attached to the records of the *Habeas Corpus* nº 2271417-73.2015.8.26.0000, decided in favor of Bayard de Paoli Gontijo, CEO of Oi S.A.

I.

São Paulo, December 17th 2015.

XAVIER DE SOUZA

Rapporteur