

JUDICIAL BRANCH
Electoral Justice

ORDER

Writ of Mandamus nº 0000141-28.2016.6.24.0019

Judge: Renato Luiz Carvalho Roberge

Tribunal: Superior Electoral Tribunal

Petitioner: Udo Döhler, Coalition” Juntos no Rumo Certo” with the parties PMDB / PSC / PTB / PTdoB / PV / PROS/ PCdoB / PTC

Defendant: Facebook Online Services Ltda Brazil

Report

Udo Döhler, candidate for mayor of the municipality of Joinville by the Coalition “Juntos no Rumo Certo”, consisting of the parties PMDB / PSC / PTB / PTdoB / PV / PROS/ PCdoB / PTC, lodged a complaint against Facebook Serviços Online do Brasil, on the grounds that the company has maintained a page on its network titled “Hudo Caduco”, containing a photomontage with his disfigured face and several posts that affect his honor and image, which goes against the electoral law, as propaganda of offensive, degrading or ridicule nature is prohibited.

It further argued that the profile is anonymous, which is also contrary to the law.

The petitioner commented on the freedom of thought, the purpose of the prohibition of anonymity and spoke about the rules that he understands are applicable, coming at the end, to request the removal of the profile, a requirement requested as preliminary injunction, as well as for the right to reply to be assured.

The preliminary injunction request was declined on page 19, granting a deadline for amendments to the initial petition, then asking for the necessary adaptations for the representation and for the reconsideration of the decision which declined the preliminary request.

By the decision on pgs. 27/28, examining the request for reconsideration, the preliminary request was granted.

The defendant presented embargoes to the declarations on pgs. 37/42 against the emergency decision and after, on pages. 62/107, the defense asked for the preliminary extinction of the process without substantive examination, on the grounds that it is illegitimate to appear in the representation. In this regard, they stated that they do not have responsibility for posts made by users of the network, being only responsible to remove a content when there is a court order.

Still as a prejudicial act to the merit, they sought the extinction of the process for ineptitude of the initial piece, as the representative did not point out the post’s URL, an element that they understand as being essential to the process, as it is the only way to identify the

publication, and because there is an incompatibility between the requests as a procedure for each of them must be implemented, and also, that they can't answer for a third party.

After discoursing about not having any interest in the outcome of the elections and commenting about their activity on the Internet, as well as on the importance of using the tool for national politics, Facebook argued that the free expression of thought makes it improper to proceed on the removal of the profile, which would be an abuse. They noted that, not being adequate to remove the profile, only the publication considered illegal should be targeted.

They further said that the responsible for the profile is not completely unknown, since when the user hires the connection service via internet providers such as Vivo, Claro, Oi and others, they provide all of their identification when acquiring a specific IP address, which becomes their electronic identity.

Finally, they said that they do not have the duty to supervise or monitor the content available on the network by users. They finalize the request asking for the invalidity of the demand.

Decision rejecting the embargoes on pages 108/109.

New defense from Facebook on pages 111/133.

On pages 144/147, the Electoral Prosecutor officiated, and his representative positioned himself for the rejection of the preliminary requests and validity of the final demands.

Decision on page 150 not accepting the defense on pages 111/133, given the incidence of consumptive debarment. On that occasion the certification of the fulfillment or not compliance with the injunction was commanded, and on the negative hypothesis, that the agent may manifest on the content of the provisions of art. 57-I of Law 9.504/97, followed by a new manifestation from the prosecutor.

Fulfilling the determined diligence, the certificate from the Notaries came attached on page 153.

On pages 176/177, the agent petitioned, informing that the company has not complied with the judicial command given preliminarily, and required that it be penalized with a suspension of activities for 24 hours.

The Public Ministry officiated again on page 178 and, at the request of the agent on pages 176/177, through order on page 179, it was given a new deadline for the defense, which, however, remained silent. (Pages 180/182).

It is the report.

Decision

1. Preliminaries

1.a. The claim of lack of action by passive illegitimacy does not deserve encouragement, even because it's connected with the merits.

Indeed, although Facebook is the mere host of the profile created and the texts are produced by a third party, it follows that the law reserves the kind of agent passive solidarity from the moment they are made aware of a court order to be fulfilled and make no provision for termination of the irregularity, or when they have prior knowledge of irregular content of broadcast material.

On the subject, it may be read the provisions contained in art. 57-F of Law 9.504/97, reproduced by art. 26 Resolution TSE 23,457/2015.

For the present case, it may be applied the hypothesis dealt by the referred article's caput, verbis:

"Art. 57-F. Apply to the content provider and multimedia services hosting the release of candidate, party or coalition propaganda, the penalties under this Act, if, in the given period by the Electoral Court, counted from the notification of the decision on the existence of irregular advertising, they do not take action for the cessation of such disclosure."

Therefore, there's no need for more clarification as it is exhaustive and self-sufficient the legal provision, in the sense that the provider of this service competes with the creator of the irregular advertising in case as it doesn't meet a court order.

It should be noted, being appropriate, that it's of extreme intelligence that the mentioned rules provide sanctions for those who, despite not being the direct author of a conduct taken as illicit, also answer for it as they have the knowledge of the offense, and they undeniably hold power over the fact.

1.b. Considering the claim of ineptitude of the initial petition, under the argument that the Uniform Resource Locator (URL) wasn't specifically pointed out, I note that the URL is correctly specified in the opening piece, as clearly shown on both the cause of action, more precisely on the page 03, and at the requests, on page 12, item "e".

The complaint dies for this and only this.

1.c. Rejected, likewise, the allegation that the applications are incompatible under the procedure, whose thesis finds resistance from the very legal disposition that rules the question.

In this respect, I transcribe the precept contained in art. 57-D of Law 9.504/97, verbis:

"Art. 57-D. It is free the expression of thought, without anonymity during campaign election, through the World Wide Web - Internet, secured rights of response, in accordance with items a, b, and c of section IV of paragraph 3 of art. 58 and 58-A, and other interpersonal media by electronic mail."

By the way, I note that the procedure is laid down in art. 96, observed in the case.

It is enough!

2. Merit

Concerning the committee responsible, I note, ab initio, that the title of the profile - Hudo Caduco - leads itself to the electoralist end that it's providing.

Indeed, it is a public and notorious fact before this city and region, as well as it is known at the state level and partly national, that the first name of the current Mayor of the city of Joinville and reelection candidate is Udo, not being necessary to have an intellect above the average to conclude that considering only that information on the profile that gave reason to the establishment of the representation, which has no other purpose other than that claimed by the agent that is to be used in the political campaign in progress, as the mentioned circumstances are sufficient to lead undoubtedly to that conclusion.

But even if it were not, to corroborate with this fact, having doubts about it, we have the proof carried from the records, more precisely the prints of the profile that are on pages 03, 13 and 14, as well as the prints taken by the Registry of this Electoral Area for the purpose of corroborating with the certificate contained on page 153, which are found on pages 154/168, that said profile is turned exclusively to the electoral process, extracting even from those documents that all his constant publications are intended to invalidate the candidate's person, having among them, conduct which, in theory, may be considered a criminal offense, as *ad exemplum*, the text contained in the publication on page 03, through which qualifies the

candidate under the assumption that he's no more than a character who "studied Military Dictatorship at the educational institution Gestapo SS", a serious hint that he's a Nazi, being useful to recall, in this particular case, that the practice of certain acts that may give someone such insult can be, in theory, crime, as precepts contained in Law 7.716/89, where it matters to see that hitting someone with discrimination or prejudice may give the possibility for characterizing the offense with the mere conduct.

Thus, there is no doubt that the profile is treated in these proceedings on the margins of the current electoral law, as clearly created for the purpose of invalidating the candidate, so that the publications in it contained, which are all of them, though with some dose of humor, contain constant attacks or assaults against the candidate.

Therefore, it's imposing to recognize, say so for that reason alone, the irregularity of the profile, since it works with grafter nature, with clear purpose of unworthiness of the candidate.

There is, thus, clear offensive character, conduct that does not align with the freedom of thought constitutionally assured, as this does not permit to overcome limits and go over another's honor.

This is, by the way, the reason of the provisions of paragraph 1^o of Art. 21 of the Resolution TSE 23,457/2015.

Furthermore, it is undeniable to recognize that the profile, whose purpose remains politicking, hides the duty of demonstration of personality, entering the intimate anonymity.

In this step, I manifest that the owner of the constant profile publications remains concealed, lying in absolute anonymity, and the name given by himself on the profile doesn't identify anyone, whether natural or legal, violating the electoral and constitutional laws.

I re-edit, by the way, the precept contained in art. 57-D of Law 9,504/97, *verbis*: It is free the expression of thought, without anonymity during the election campaign, by the World Wide Web - Internet, ensuring the right of reply, in accordance with items a, b, and c of section IV of § 3 of art. 58 and 58-A, and other means of interpersonal communication by electronic mail, whose standard is in perfect harmony with the constitutional command, which is also the time that applies the principle of freedom of manifestation of thought that prohibits anonymity. Read the provisions of item IV of art. 5 of Carta Maior.

It should be noted that anonymity, as it is well known, becomes the state of anonymous, that is, something with no demonstrated personality, unidentifiable, and unquestionably that one who is not anonymous holds character, and the civil law divides personality into natural and legal persons, starting the existence of the first with the birth and the second, with the regular application of their constitutive act.

So as the profile shows someone who has called himself "Hudo Caduco", another conclusion is not necessary to achieve than that the actual holder of advertising, which, I repeat, definitely geared to grafter, is absolutely covered by anonymity because of the unknown personality.

On the other hand, given the content of the presented defense, I note that the legislation, whether constitutional or infraconstitutional, didn't caution that one who employs freedom of expression can restrict their real identification to a single person, such as social network in question or internet providers, but rather address the issue in a broad sense, in a way that the public identification of the holder of the expression is required by law.

Indeed, it can be seen an offense to the rule as the maintainer of the network didn't demonstrate the Profile holder, but merely said that through IP providers the responsible can identified.

In a case similar to the case law:

REPRESENTATION. IRREGULAR ELECTORAL PROPAGANDA, ANONYMOUS PROFILE ON FACEBOOK WITH CONTENTS EXCLUSIVELY OF ELECTORAL POSTS. IMPOSSIBILITY.

1. Demonstrating that a particular profile on Facebook is intended exclusively for publication of materials of electoral content, under the cloak of anonymity, its suspension is appropriate.

2. Revealing throughout the process that the simple removal of the profile posts wasn't enough to comply with the electoral law, with subsequent and repeated new materials with identical content posts, it is concluded by the reasonableness of the decision that may have determined the suspension of the profile itself, at least until the full identification of the author, as determined in the contested decision.

3. The simple fact that one can, in theory, via court order, get the number of IPs from the responsible for the profiles doesn't rule out by itself the apocryphal nature of the posts, considering also that in the present case, this identification has not yet been made.

4. Appeal which is denied. (TRE / PR - Representation No. 307,861, Judgment No. 48652 of 19.9.2014, Rapporteur (a) Leonardo Brown Mendes Published: PSESS - Published in Session Date 09/19/2014 - emphasis added).

Thus, it's imposing to show the confirmation of the decision on urgent character that ordered the removal of the profile, as well as it defined a fine established per day of failure, that it, however, must be limited to the number of days during which is the period of the current electoral vote, since, once the election is over, the conduct will no longer be against the electoral system, and the issue will pass, to the common law.

In addition to all that was exposed, I note that before the breach of the immediate injunction by the company, it's possible the application of the penalty provided for in art. 57-I of Law 9,504 / 97, and this, although having had the opportunity to present defense of the right to respect, muted and, moreover, remained in noncompliance with the court order, so that the profile treated in these proceedings, which is accessed at this moment both by the title "Hudo Caduco" and by the URL, and remains available.

Thus, as the company is aware of the irregular advertisement disseminated on their site and it's still not complying with the judicial command, it must be sanctioned by the terms set out in art. 57-I, throughout the whole national territory, in addition to answering to the sanction because of the misconduct arising from anonymity - art. 57-D of said Law, by express provision contained in the art. 57-F, caput, all of Law 9,504 / 97.

About the sanction that stems from the art. 57-I, it's adequate to open a parenthesis to conclude that the elections remain on course in this city and that the agent remains in dispute on the second round, so that judgment has no other measure to take at this point than to make the company stop their conduct, because as we see from the file, the irregular practice remains, in disobedience not only of the legislative rules as of the judiciary, but more serious than that, it can lead to irreparable damage to the ongoing electoral process.

I stress, still, that the defendant is a legal entity with global operations and strong financial power, so both the pecuniary penalty and the fine amount resulting from infringement by irregular canvass must be within the maximum provided for each one of the conducts, otherwise the criminal conviction will be empty, as it's certain that compared to the known economic power of the company, if fixed in infinitesimal amount, the sanctions won't achieve their purpose, which is to make them respect the legal precepts.

Finally, as emphasized elsewhere, as the publications contained in the profile are offensive to the candidate and because the provision contained in the caput of art. 57-F of Law 9,504 / 97, the defendant is responsible for the conduct from the moment that he ceased to comply with the judicial command which granted the urgent need for protection under art. 57-D of the aforementioned Law, I assure the agent of the right of reply against the defendant, which should be carried out following the disposition contained in art. 58, § 3, IV and its paragraphs of Law 9,504, that has already been referred to.

Based on what has been said, I consider as valid the claims made by Udo Döhler in this representation made against Facebook Serviços Online do Brasil Ltda to:

- a) confirm the decision to anticipate the effects of protection, and determine:
 - a.1) that the defendant delete and keep deleted during the term of this electoral campaign, which ends only with the 2nd shift, the profile "Hudo Caduco" under URL;
 - a.2) that the defendant provide the IP and/or any other element able to identify the owner of the profile;
 - a.3) the maintenance of a fine of R \$ 30,000.00 (thirty thousand reais) per day of non-compliance to the court order specified in the respective command, which, however, is limited in equivalent to the number of days until the definition of the major election in this district;
- b) order the defendant to pay a fine of R \$ 30,000.00 (thirty thousand reais) for violation of the art. 57-D, c/c art. 57-F, caput, both of Law 9,504 / 97;
- c) order the suspension, for twenty-four hours, of the defendant's website throughout the national territory, because of transgression of art. 57-I, caput, of Law 9,504/97, with the possibility to duplicate the time limit if the conduct remains reiterated, as defined in the first paragraph of said device, should during the period suspension be informed to all users of the site that the suspension occurs because of disobedience of the electoral legislation, in accordance with § 2 of the said legal provision;
- d) ensure the agent the right response to the defendant, along the lines of art. 57-D, c / c the caput of art. 57-F, both of Law 9,504 / 97 and during the execution of the act, the respect of the rules contained in art. 58, § 3, IV and their subitems, of that law.

Unappealable, the National Telecommunications Agency - ANATEL - may be officiated with a copy of this sentence to immediately determine that all Internet providers operating in Brazil suspend the activities of Facebook's site for a period of 24 hours, throughout the national territory, meanwhile the site shall display a note to users that the act stems from determination due to breach of electoral law.

Joinville, October 5, 2016.