

File no. 59715/3/2010

ROMANIA
BUCHAREST COURT OF APPEAL
SECTION 8 FISCAL AND ADMINISTRATIVE LEGAL DEPARTMENT
CIVIL DECISION no.3421
PUBLIC SESSION FROM THE 4th of October 2012
COURT CONSTITUTED BY:
PRESIDENT: DANIEL GHEORGHE SEVERIN
JUDGE: IONEL RADU
JUDGE: DECEBAL CONSTANTIN VLAD
REGISTRAR: DANIELA STEFAN

The pronouncing of the request of appeal formulated by the defendant appellant The Ministry Of Culture and Cults is pending against the civil sentence no.4222/09.12.2011 pronounced by the Courthouse of Bucharest - 9th section of the administrative and fiscal legal department in contradiction with the respondents The Centre for Judicial Resources, Greenpeace CEE Romania having as object "Law 544/2001".

Oral debates between parties took place in the public session on the 20th of September 2012 when they were recorded in the conclusion of the meeting from that date which makes up an integral part of the present decision. Having the need for time to deliberate and to give the parties the possibility of handing in written conclusions to the file, the Court has postponed pronouncing to the dates of 27.09.2012 and 04.10.2012 when it pronounced the following decision.

The Court

On the recourse from the present cause:

By the action registered before the Court of Bucharest - 9th section of the administrative and fiscal department under no.59715/3/2010, plaintiffs Centre for Judicial Resources and Greenpeace CEE Romania have called to trial the defendant The Ministry of Culture and Cults for the determination of the court which will be pronounced to have ordered the defendant to provide information of public interest requested by the plaintiffs on the 5th of October 2010: ordering the defendant to pay moral damages in value of 1 leu.

In motivation the plaintiffs have shown that in essence on the date of the 5th of October 2010 they have addressed the defendant The Ministry of Culture and Cults a claim through which they have asked the communication of documentation submitted by S.C. RMGC S.A. For the obtainment of a new certificate of archeological download for the Carnic Massif, respectively: a. Preventive archeological research report in the Carnic Massif, Rosia Montana, Romania, Rosia Montana mining project final synthesys document – 2009 (including the technical factum for the identification of the researched archeological site). b. Technical documentation for the obtainment of the technical approval for the identification of the researched archeological site, investigated object of the "Report of preventive archeological research in the Carnic Masiff, Rosia Montana, Romania". c. Rosia

Montana mining project. Analysis of the Environmental Report regarding the processes and procedure of surface archeology Oxford Archeology, July 2009 d. The technical project of the mining objective Rosia Montana".

On the date of the 8th of November 2010 the defendant expressed that he could not communicate the solicited information without indentifying any legal motiv and the plaintiffs considered that this refusal was ilegal, the solicited information bein public and refering to archeological remains of national and european interest.

The law provisions of the Law no.544/2001 were invoked.

The defendant, The Ministry of Culture and Cults countered by requesting that the claim be rejected as unfounded.

In motivation it showed that, in essence, the intstitution proceeded in conformity with the provisions of article 7 from Law no. 544/2001 reagrding the free access of public interest information with subsequent modifications and completions, to the formulation and transimition within term, towards complainants of a motivated answer, through address no. 3792/11.10.2010, issued by the Director of Cultural Patrimony of the Ministry of Culture and National Patrimony, registered at the Centre for Judicial Resources under no. 829/08.11.2010.

Taking into view the provisions annex. 32 from the methodological norms from the 7th of February 2002 of the application of Law no. 544/2001 regarding free access to public interest information and of article 36, line 1 of the methodological norms from the 7th of February 2002of application of Law no. 544/2001 there must be formulated beforehand an administrative complaint.

In reality the plaintiffs are dissatisfied by the received answer, being, unable, in our opinion, to claim that they did not receive an answer to their request.

In as, the provisions in article 15 and the next Codes of Civil Procedure were invoked, the provisions of Law no. 544/2001 regarding free access to public interest information with subsequent modifications and completions as those of the Methodological Norms from the 7th of February 2002 of application of Law no. 544/2001.

Through civil sentence no. 4222/09.12.2011, The Bucharest Courthouse section 9 – CAF has admitted in part the request of summons and ordered the defendant to provide in the span of 10 days the public interest information through point 1 of claim no. 3916/09.10.2010 denying the rest of the action as unfounded.

In order to pronounce this sentence the first instance has retained the following:

Through the request registered under no. 3916/09.10.2010, the plaintiffs of the Centre of Judicial Resources and Greenpeace CEE Romania have requested the defendant The Ministry of Culture and Cults to submit the following information:

1. The documentation submitted by S.C. RMGC S.A. For the obtainment of a new certificate of archeological download for the Carnic Masiff, respectively:
 - a. Preventive archeological research report in the Carnic Masiff, Rosia Montana, Romania, mining project Rosia Montana final synthesys document – 2009 (including technical memorandum for the identification of the researched archeological site).
 - b. Technical documentation for the obatinement of the technical approval for the identification of the investigated object of the "Report of preventive archeological research in the Cranic Masiff, Rosia Montana, Romania".
 - c. Mining project Rosia Montana. The Environmental Analysis regarding processes and procedure of surface archeology Oxford Archeology, July 2009
 - d. Technical project of the Rosia Montana mining objective.
2. The minute of the first meeting of the National Archeology Commission as also the list of the participants to the meeting.
3. The date of the next meeting of the National Archeology Commission for this project, and in the case that this date is not known, for it to be comunicated subsequently, after its' setting, as also the participant list and any new documentation that would have been submitted.

4. Which the state in which the preparation of the documentation for the inclusion of the Rosia Montana area in the UNESCO patrimony.

5. If at the National Archeology Commission the project to include the Rosia Montana area in the UNESCO patrimony is taken in to account.

Through address no. 829/08.11.2010, the defendant The Ministry of Culture and the Cults has responded to the plaintiffs the following:

1. The documentation referring to archeological research in the Carnic Masiff was not submitted by S.C. RMGC S.A. But by the Director for Culture and National Patrimony Alba. In this context, we cannot transmit this documentation because it is not in public debate nor for a specialty commission nor for any other scientific organisms. Therewith we communicate that the archeological research reports represent scientific creations are under copyright, in this matter the plaintiffs being able to address the signatories of these documentations.

2. Referring to the request to communicate " the minute of the first meeting of the National commission of Archeology as also the participants list" there have been requested further specifications, taking into account the fact that the first historical meeting of this commission had nothing to with the subject of the petition. Therewith the subject Rosia Montana had not been included on the agenda in the last meeting of the National Archeology Commission which took place on the 24th of September 2010.

3. The date of the next meeting of the National Archeology Commission is not known, it is established according to requirements and documentations submitted to analysis. It is not known if a subject referring to the analysis of the documentation referring to Rosia Montana will be introduced on the agenda of the National Archeology Commission because legal or debate proceedings have not yet been started. In the case in which legal conditions for the analysis of the subject dedicated to archeological research in the carnic Masiff, Rosia Montana area in the National Archeology Commission are met, the agenda will be displayed in time on the Ministry of Culture and National Patrimony's website.

4. Referring to the question " which is the state in which preparation of the documentation for the inclusion of the Rosia Montana area in the UNESCO patrimony is in" it has been shown that such a project is not prepared by the Ministry of Culture and National Patrimony.

5. A "project for the inclusion of the Rosia Montana area in the UNESCO patrimony: has not been transmitted, for analysis, to the National Archeology Commission.

According to article 2, line b, of Law no. 544/2001 regarding free access to public interest information, by public interest information it is understood all information that regards the activities or results from the activities of a public authority or institution, definition at letter a, - any public authority or institution as any autonomous administration that uses public financial resources and any free access to this information cannot be restricted, in accordance with article

In accordance with the provisions of article 22 paragraph 1 of Law no. 544/2001 in the case in which a person considers itself injured in its' rights provided in this law, this person can file a complaint at the administrative legal department in the area in which the person resides or in the area in which the headquarters of the authority or public institution are. The complaint can be filed within 30 days of the deadline provided in article 7.

Accordingly the complaint indicated in article 32 and article 36 paragraph 1 of the Methodological Norms of application of Law no. 544/2001 is optional the party being bound to respect the filing deadline for the complaint. In this case the plaintiffs have exercised in the legal limits the right to demand and obtain from the defendant institution public interest information and it had the obligation of providing the requested public interest information in writing or verbally according to article 6-7 of Law no. 544/2001 not being exempt from the free access of citizens.

In the case of Tatar vs. Romania (decision of 27.01.2009), The European Human Rights Court has reminded the applicable principles in regard cu respecting the right to a healthy environment

indicating the fact in the analysis of article 8 of the Convention that in the content of obligations with a positive content in taking all reasonable and adequate measures for protecting the right that the plaintiffs have in the grounds that in the first instance enters the creation of a legislative and administrative framework that has as its objective the effective prevention of damages to the environment and on human health.

Also, the decisional process should imply in the first case the conducting of investigations and proper studies so as to prevent and evaluate beforehand the effects the activities which could bring harm to the environment and thus permit the establishment of a fair balance between the diverse competing implicated interests. The importance of public access to the conclusions of these studies has also been underlined as well as the information which permits the evaluation of the danger to which it is exposed as well as the possibility for persons interested to formulate before national courts an action against any decision, any act or any omission in the case in which it is considered that their interests have not been taken into consideration sufficiently in decisional process.

Or, the court has retained that a mining project with the purpose of obtaining a certificate of archeological download for the Carnic Masiff, Rosia Montana, Alba county, area identified by the Stereo coordinates 70, as to the impact it could have on the environment (atmosphere, ground water etc.), requires the respecting of positive obligations by the authorities.

Although in the address no. 829/08.11.2010, the defendant the Ministry of Culture and Cults upheld that the documentation referring to archeological research in the Carnic Masiff was not submitted by S.C. RMGC S.A. But by the Directory for Culture and National Patrimony Alba, the court observed that this claim is disproven by the address no. 3614/25.10.2010 issued by S.C. Rosia Montana Gold Corporation S.A. from which it results that this society has submitted the documents in cause being subsequently forwarded by the Directory for Culture and National Patrimony Alba through the address no. 610/28.06.2010 (f.34-35).

The directive 2003/4/CE of the European Parliament and of the Council of the 28th of January 2003 regarding access of the public to information about the environment which transposes in the law of the Union the Aarhus Convention (ratified by Romania through Law no. 86/2000), aims to guarantee a right of access to information about the environment held by public authorities in favour of citizens and of enterprises without any obligation from their part to declare an interest.

The directive permits member states to foresee that their requests for information about the environment can be refused in certain cases especially when the disclosure of this information could negatively affect the confidentiality of the procedures undertaken by public authorities *with the condition that this confidentiality be provided by the law*.

Obviously it is necessary that an explicit norm exist in national law so that public authorities cannot unilaterally establish the circumstances in which confidentiality is opposable. This implies especially the fact that national legislation establishes clearly the content of the notion "procedures" performed by public authorities, referring to the final steps of the decision making process of public authorities.

Any public authority which invokes a confidentiality of procedures in order to refuse a request of access to information about the environment must undertake for each separate case a comparative evaluation of the interests at stake.

In this case the defendant the Ministry of Culture and Cults has not invoked a legal text which foresees unequivocally the confidentiality of the releasing procedures of a certificate of archeological download and has also not made a comparative evaluation of the interests at stake but has only refused the communication of the information on the grounds that it is under the protection of copyright law.

The court cannot retain the defendants' defence as to justify the refusal of communication because according to article 33, paragraph 1 of Law no. 8/1996 use is permitted without the consent of the author and without payment of any remuneration of the next uses of any work brought to public knowledge beforehand with the condition that these be according to good practice, to not

contravene normal exploitation of the work and to not prejudice the author or the holders of the rights of use. a) the reproduction of a work in legal, parliamentary and administrative proceedings or for purposes of public safety.

Although it cannot exclude the existence of elements subject to copyright in the documentation requested by the defendant, the court retains that by its' submitting to an administrative procedure a public communication was carried out in accordance with article of Law no.8/1996 and the purpose for which it has been carried out (the issue of a certificate of archeological download) justifies in the case at hand the reproduction of the work through copying and transmission towards the persons which legitimately justify their request through general interest of having free and unrestricted access to any public interest information which is a basic principle of the relations between persons and public authorities in accordance with the Constitution of Romania and international documents ratified by the Parliament of Romania. Of course, accepting the hypothesis of the existence of a work subject to this law the other conditions of Law no. 8/1996 must be upheld.

The court has denied the request regarding the rest of the information requested (points 2-5 of the request no. 3916/09.10.2010) as unfounded taking into account that the answers offered by the defendant have been in accordance with the information held by the defendant at that date.

The court has appreciated that no violation of the provisions of Law no.544/2001 can be retained as the essence of this regulation is that public information be held by the authority or that it be empowered to hold it and be bound to call on other authorities or institutions in order to obtain it.

In case the provisions of article 24 of the methodological norms of application of Law no. 544/2001 were not incident because from the drafting of the request the competent institution or the authority towards which it should be redirected could not be determined. In the answer it was shown that a project for the inclusion of the Rosia Montana area in the UNESCO patrimony is not prepared by the Ministry of Culture and National Patrimony and that neither was such a project transmitted for analysis to the National Archeology Commission.

According to article 5, paragraph 4 of Law no. 544/2001, access to public interest information is realised through the displaying on its' own internet page thus the defendant has fulfilled its' obligation to communicate to the plaintiffs held information, respectively that the date of the next meeting of the National Archeology Commission is not known which is established according to necessities and documentation submitted to analysis, it is not known if a subject referring to the analysis of the documentation referring to Rosia Montana will be introduced on the agenda, as well as that the agenda will be displayed in time on the website of the Ministry of Culture and National Patrimony.

As respects to the complaint of moral damages, the court has retained that the plaintiffs have not proven a moral damage which cannot be repaired by simply admitting the present action and that requires a punitive compensation. The motivation for this claim is based on the "symbolic" effect of the defendant's obligation to pay the sum of 1 leu, and the court retains that the significance of admitting the action and of the falling of the defendant into claims following the ascertainment of not respecting legal obligations is much more important from this point of view constituting a sufficient moral repair.

Against this decision the defendant appellant appealed in which he requested the admission of the appeal so as it was formulated, the modification in part of the appealed sentence under the aspect of the measure arranged at point 2, of its' apparatus in the sense of rejecting the claim regarding the obligation of the defendant to provide the plaintiffs with information of public interest requested through point 1 of the request no. 3916/09.10.2010 of providing information of public interest within 10 days, and maintaining the other measures arranged by the court as legal and solid.

In motivation of the way of appeal the appellant has shown the following:

"With regards to the requested documents, our institution, after consulting the specialised Directory understands to evident the following specifications:

The documentations shown previously are held by the County Directory for Culture and National Patrimony Alba (decentralized service of the Ministry of Culture and National Patrimony with its' own legal personality) and have stood at the basis of the issue by this institution of The Archeological Download Certificate no. 9/2011 regarding the Carnic Masiff – Rosia Montana.

According to the provisions in article 5 paragraph 5 from the Government Ordonance no. 43 of 2000 regarding the protection of the archeologic patrimony and the declaration of some archeological sites as areas of national interest , republished, the Certificate of Archeological Download is issued by the decentralized public services of the Ministry of Culture and National Patrimony."

In this context are also signalled the provisions in article 6 paragraph 5 from the same bill in concordance with "in view of issuing the certificate provided at article 5, paragraph 5, of the Government Ordonance no. 43 from 2000, republished, for sites located in areas of priority archeological interest, sites classed in group A of the Historical Monuments list and for all investments with the exception of private residences located in other areas, research reports are sent for aproval to the National Archeology Commission", specialised scientific organism, without legal personality, with an advisory role in the field of archeologic patrimony around the Ministry of Culture and National Patrimony.

In the basis fo the provisions in article 24 of the Methodological Norms from the 7th of February 2002 of appliance of Law no. 544/2001 reagrding free access to public interest information with subsequent modifications and completions, "in the case in which the request does not fit within the competence of the public authority or institution, in the span of 5 daysfrom receiving the structures or persons responsible for direct public informationtransmit the request towards the competent institutions or authorities and inform the solicitant about them."

Thus the documentations provided earlierhave been analised by the County Directory for Culture and National Patrimony Alba which, in one's capacity as issuer of the Archeological Download Certificate, is the institution which holds all documents wich have been taken into account upon the issue of the administrative act of reference.

We specify the fact that, the Cultural Patrimony Directory within the Ministry of Culture and National Patrimony has transmitted with the address no. 741/06.03.2012to the County Directory for Culture and National Patrimony Alba, for competent solutioning, request no. 014/05.10.2010.

Therewith we underline the fact that the court of first instance has not retained in its' considerations the essential aspects regarding the alleged "documentation submitted by S.C. RMGC S.A. For obtaining a new archeological download certificate for the Carnic Masiff" evident by our institution in the contents of the opening and the session notes, so that we understand to reiterate the following:

The documentation referring to the archeological research in the Carnic Masiffwas submitted for aproval at the National Archeology Commisssion through the address of the Culture and National Patrimony Directory Alba no. 610/28.06.2010 and therefore we reiterate the point of view expressed through the address no. 3792/11.10.2010 issued by the Cultural Patrimony Directory within the Ministry of Culture and National Patrimony. The fact that to this documentation there was also an address of contestation from RMGC attached, addressed to the Directory for Culture and National Patrimony Alba is irrelevant, so long as the documentations are forwarded for aproval to the National Archeology Commission by the county directoriesfor culture and national patrimony, in accordance with article 22 from the Methodology of application of the archeological download procedure aproved through the order of the Ministry of Culture and Cult no. 2518/2007. Therewith we underline the fact that the specialised scientific organism – the National Archeology Commission – can only pronounce itself on documentations transmitted in accordance with administrative analysis procedures of documentations within this institution. Besides, this aspect is shown from the initial response transmitted through address no. 3792/11.10.2010 issued by the Cultural Patrimony Directory within the Ministry of Culture and National Patrimony.

In law, we are formulating our appeal on the provisions of article 20 paragraphs 1 and 2 of Law no. 544/2004 regarding administrative legal content with subsequent modifications and completions, the provisions in article 24 of the methodological Norms of the 7th of February 2002 for the application of Law no. 544/2001 and all the provisions of article 3041 of the Civil Procedure Code the court being able to examine the cause under all aspects."

The appeal is founded, for the reasons which will be shown further.

Thus the Court appreciates that the information requested by the respondent plaintiff through point 1 of request no. 3916/09.10.2010, respectively the documentation submitted by SC RCMG SA for obtaining a new archeological download certificate for the Carnic Masiff do not concern the activities of the Ministry of Culture and also do not result out of the activities of this authority as provided by the provisions of article 2 letter b) of Law no. 544/2001. These in the conditions in which the aforementioned documentation has not been forwarded to the recurrent defendant but to the National Patrimony and Culture Directory Alba, as also to the National archeology Commission, as results from the addresses found on pages 34, 35 of the background file. The court ascertains that this commission is not a public institution subordinate to the Ministry of Culture nor a decentralized service of it but has an autonomous character – as is resulted from the provisions of article 14 from the Government Ordinance no. 43/2000. The National Archeology Commission functions as a specialised scientific organism without a legal personality with a consultative role in the field of archeological patrimony around the Ministry of Culture and Cults.

In light of the considerations shown above the Court appreciates that the public interest information requested are not held by the Ministry of Culture and in consequence on the grounds of article 312 paragraph 2, 3 code of civil procedure the Court will allow the appeal and will modify the recurred sentence in the sense of denying the action unfounded as a whole.

For these reasons
In the name of the law
decide:

Allow the appeal formulated by the recurrent defendant the Ministry of Culture and Cults against the civil sentence no. 4222/09.12.2011 pronounced by the Bucharest Courthouse section 9 administrative and fiscal legal department in contradiction with the respondent plaintiffs the Centre for Legal Resources and Greenpeace CEE Romania.

Modifies in part the recurred sentence in the sense that:

It reject the action as being unfounded.

Irrevocable.

Pronounced in public session, today, 04.10.2012

PRESIDENT,
DANIEL GHEORGHE SEVERIN,

JUDGE,
IONEL RADU,

JUDGE,
DECEBAL CONSTANTIN VLAD,

REGISTRAR,
DANIELA STEFAN