CIVIL DECISION No 3132 of 14 August 2013

BUCURESTI COURT OF APPEAL

SECTION VIII-A ADMINISTRATIVE AND FISCAL DISPUTE/CONTENCIOS

(Case No. 17632/3/2013)

Pages 3 to 10:

By application registered with the Bucharest Court under no.17632 /3/2013, the plaintiffs GREENPEACE CEE ROMANIA and ASOCIAȚIA BANKWATCH ROMÂNIA in contradiction with the defendants AGENȚIA DE PROTECȚIE A MEDIULUI GORJ and SC COMPLEXUL ENERGETIC OLTENIA SA - SDM TG-JIU - EXPLOATAREA MINIERĂ DE CARIERĂ ROVINARI, requested the suspension of the execution of the environmental agreement concerning the project DEFINITIVE REMOVAL FROM THE FOREST LAND OF THE AREA OF 66, 50 HA OF WHICH 58,9586 HA FOREST LAND LOCATED WITHIN THE FORESTRY PARK OF TÂRGU JIU, UP I STRÂMBA, FOR THE CONTINUATION OF THE LIGNITE EXTRACTION WORKS WITHIN THE TISMANA I - ROVINARI MINING PERIMETER.

In their reasoning, the applicants stated that the requirement of a well-justified case was met, as a misclassification had been made in the annexes to GD No 445. /2009, as it concerns not only deforestation, but also the extension of the lignite quarry, there is no justification for the slicing of the project for the extension of a coal mine, without analysing the impact of the extension of the quarry, no provision is made for measures to compensate for the deforestation works, no town planning certificate was issued, there is no environmental impact assessment report, the cumulative effects of the project with other deforestation projects in the same area, the effects on the health of the population, on water and on protected sites and species have not been analysed, and the provisions of the Aarhus Convention have been infringed by not making the documentation public. As regards the imminent damage, they pointed out that the deforestation would result in the construction of a lignite quarry without legal development consent.

In law, they invoked the provisions of HG No 445/2009, Law No 554/2004.

The defendant Gorj Environmental Protection Agency submitted a statement of defence, in which it requested that the application be rejected as unfounded, on the grounds that all the relevant legal provisions had been complied with in issuing the environmental permit.

The defendant SC COMPLEXUL ENERGETIC OLTENIA SA - EXPLOATAREA MINIERĂ DE CARIERĂ ROVINARI also requested in its statement of defence that the application for suspension be rejected as unfounded, as the conditions of Article 14 of Law 554/2004 were not met.

Copies of the environmental agreement and the documentation on which it was based, proof of completion of the prior procedure and legal practice were submitted to the file.

By civil judgment no. 3469/14.06.2013, the Bucharest Court rejected the application as unfounded.

In its reasoning, the first court stated that on 19.11.2012, the Environmental Protection Agency of Gorj issued environmental agreement no. GJ-17 for the project DEFINITIVE REMOVAL FROM

THE FOREST LAND OF 66.50 HA OF WHICH 58.9586 HA OF FOREST LAND IS EXTENDED WITHIN THE FRAMEWORK OF THE TÂRGU JIU FOREST OCOL, UP I STRÂMBA, FOR THE CONTINUATION OF LIGNITE EXTRACTION WORKS WITHIN THE TISMANA I EXPLOITATION PERIMETER - ROVINARI MINING EXPLOITATION - files 57-63.

According to Article 14 of Law 554/2004, in well-justified cases and in order to prevent imminent damage, after the referral to the public authority that issued the act or to the hierarchical superior authority, the injured party may request the competent court to order the suspension of the execution of the unilateral administrative act until the decision of the court on the merits.

It follows, therefore, that for the suspension of an administrative act, which is a measure ordered in exceptional cases, two conditions must be met cumulatively: the existence of a well-justified case and the need for suspension to prevent imminent damage.

The plaintiffs invoked the existence of a well-justified case arguing that the administrative act whose suspension is requested is not based on all the necessary documentation, but the court considers that the requirement of the existence of a well-justified case, as defined by Article 2 letter t of Law 554/2004, namely a circumstance related to the state of facts and law, which is likely to create a serious doubt as to the legality of the administrative act, is not fulfilled.

The issue of the documents submitted by the applicant in order to obtain the environmental consent cannot be dealt with in an application for a stay of proceedings, as these issues will be examined in the course of the determination of the merits of the case. The issues relating to the opening of a new quarry or the extension of an existing quarry on the basis of a 1983 authorisation require a detailed examination of the applicable legal provisions and the taking of evidence in the substantive action for annulment of the act.

Furthermore, a mere challenge to the manner in which the environmental impact assessment was carried out is not sufficient to give rise to a serious doubt as to the legality of the measure whose suspension is sought, and evidence must be adduced on that point.

The documentation on the basis of which the opinion was issued has been submitted to the case file, and several checks and studies have been carried out, including an environmental impact study - file 232 et seq., in which the effects on water, air, soil, protected species or human communities are analysed. In the context of an application for suspension, it is not possible to determine how well founded those conclusions are, since the applicants' claims concerning the lack of appropriate assessments must be proved, including by scientific means, by way of an action for annulment.

At the same time, evidence of the submission of the project for public consultation was submitted to the case file, with notices being published on the internet, in the written press or at the offices of local public institutions, so that the defendant cannot be accused of an apparent lack of transparency.

The 13 pages of the agreement contain a detailed description of the project, the documents on the basis of which the agreement was issued, the stages completed, the reasons for issuing the agreement and the measures required to maintain it.

In this case, therefore, there is no obvious ground of illegality, as the fault of the issuing authority is not clear enough to allow serious doubts to be raised, but only by the submission of evidence on the factual situation in the case file will the legality of the issuing of the environmental permit be assessed.

On the other hand, in order for the suspension of the act to be pronounced, the condition of imminent damage must also be cumulatively fulfilled, and the mere challenge by the applicants of the legality of the issuance of the administrative act cannot justify the suspension of enforcement under Article 14 of Law 554/2004.

As regards the condition of imminent damage, the Court finds that the applicants have not proved that the condition of imminent damage, as defined in Article 2(2)(a) of Regulation No 554/2004, is fulfilled. s of Law No 554/2004, as future and foreseeable material damage or, as the case may be, foreseeable serious disruption of the functioning of a public authority or a public service.

The plaintiffs do not prove the imminence of damage, since they have shown that the damage to the environment has not been properly analysed, since after the clearing of the forest a new lignite quarry will in practice be built without a proper development act.

According to Article 11 paragraph 1 of GEO 195/2005, the application for and obtaining of environmental consent is mandatory for public or private projects or for the modification or extension of existing activities that may have a significant impact on the environment.

According to Article 2, paragraph 3 of the same act, the environmental consent is the administrative act issued by the competent authority for environmental protection, which sets out the conditions and, where appropriate, measures for environmental protection, which must be respected in the case of implementation of a project.

The combination of these legal provisions shows that obtaining the environmental consent is a stage in the implementation of a project, being the act imposing on the proposed intervention conditions and measures arising from the need to protect the environment.

The issue of the environmental consent is therefore prior to the issue of other administrative acts which can be effectively executed. In practice, the applicants base their claim on the risk of further development of a lignite quarry in that area, but their request for suspension of the implementation of the environmental agreement cannot be justified by the harmful effects of other acts which would ensure the actual implementation of the project covered by the environmental agreement.

Even the imminence of the actual clearing of the forest vegetation cannot be relied on in the present case, given that the clearing is not carried out on the basis of the environmental agreement, since administrative acts must be issued by the Territorial Forestry and Hunting Inspectorate. Moreover, the environmental agreement - page 62 overleaf - states that the clearing of forest vegetation is carried out only after approval of the documentation, the quantitative and qualitative assessment of the standing timber, approval of the act of development and the issue of the logging permit.

The plaintiffs appealed against this judgment, arguing that:

1. The judgment delivered by the court of first instance is unsubstantiated in fact and in law (Article 488(6) of the CCP).

2. The judgment handed down by the court of first instance is given in violation and misapplication of the rules of substantive law (Article 488(8) of the CCP):

The court of first instance did not analyse each individual ground for suspension, which in its view represents a well-founded case, and did not state why each individual ground does not cast doubt on the legality of the contested act. The mere fact that documentation has been submitted cannot remove any doubt which might lead to the granting of an application for suspension of the administrative act. In such a hypothesis, no application for suspension could ever be admitted because some documentation is produced by the issuer in all cases. Thus, the text of the law would become inapplicable. However, this interpretation is unlawful, as legal texts must be interpreted in such a way that they can produce legal effects.

In the present case, the documentation refers to the extension of a lignite quarry (technical memorandum) and the contested act relates only to the clearing of land for the purpose of extending the quarry, based only on an evaluation report for the clearing of land and not for the extension of the quarry, nor on a building permit for the extension of the quarry. However, such an act may clearly be unlawful in the light of the provisions of HG 445/2009 and the practice of the European Court of Justice, which prohibit the division of the project into smaller projects and their separate assessment.

Nor has it been examined whether all the documents required by law to form the basis of the contested administrative act have been drawn up or whether there are missing documents.

In the present case, not all the regulatory acts required for the issuance of the environmental consent exist. In order for the environmental consent to be validly issued, there must be a town planning certificate, which has not been submitted in concerned. The evaluation report also appears to be incomplete with respect to the requirements of Order 863/2002. There is no documentation for the compensation required by the Forestry Code. There is no proof of public consultation, which is mandatory and must take into account the principles of the Aarhus Convention, ratified by Romania through Law 86/2000. Moreover, the defendant APM Gorj admitted that it did not publish the technical memoranda on its website.

The court of first instance did not rely on rules of law in finding that the request for suspension did not meet the two criteria required by law, well-justified case and urgency.

The suspension of acts likely to cause harm must be assessed in concrete terms and not on the basis of ambiguous generic assessments. Thus, the court of first instance stated that 'the action to suspend the implementation of the environmental agreement cannot be justified by the harmful effects of other acts which would ensure the actual implementation of the project covered by the environmental agreement'. It is clear from the file, and they have stated in their reply to the statement of objections, as did the defendants in their statement of objections, that the expansion of the lignite quarry would not require other acts of approval, so what other acts which ensure the actual implementation of the lignite quarry does the court refer to? It is clear that only this environmental agreement for deforestation will be taken into account in the implementation of such a project. They have submitted documents in the case file showing the pollution caused by the lignite quarries in Oltenia and the danger to human health.

It is also clear that the environmental agreement in this case refers to the lignite quarry without analysing its impact on environmental factors, which casts serious doubt on the legality of this act.

In conclusion, the conditions for suspending the contested administrative act are met.

The provisions of Law 554/2004 must be interpreted in accordance with the provisions of the Aarhus Convention, Article 9 of which states that it is mandatory to have the possibility of suspending administrative acts which have negative effects on the environment.

It must also be interpreted in accordance with the provisions of the Treaty on European Union relating to environmental protection:

- the precautionary principle in decision-making, which is a fundamental principle of the European Union under Article 191(2) of the Treaty on European Union, consolidated version, published in the Official Journal of the European Union No C 83/13 of 30 March 2010,

- the principle of integration of environmental policies into all Union policies and activities with a view to achieving sustainable development (principle defined in Article 11 of the Treaty on European Union), principles also reiterated by GEO 195/2005 on environmental protection.

On 12.07.2013, the defendants filed an appeal, requesting the dismissal of the plaintiffs' appeal as unfounded and the maintenance of Judgment no. 3469/14.06.2013 of the first court as well founded and legal.

From the evidence, the Court finds that on 19.11.2012, the Gorj Environmental Protection Agency issued environmental agreement no. GJ-17 for the project DEFINITIVE REMOVAL FROM THE FOREST LAND OF THE AREA OF 66.50 HA OF WHICH 58.9586 HA ARE FOREST LAND EXTENDED WITHIN THE FRAMEWORK OF THE TÂRGU JIU FOREST OCOL, UP I STRÂMBA, FOR THE CONTINUATION OF LIGNITE EXTRACTION WORKS WITHIN THE TISMANA I EXPLOITATION PERIMETER - ROVINARI MINING EXPLOITATION - files 57-63.

According to Article 14 of Law 554/2004, in well-justified cases and for the prevention of imminent damage, after the referral to the public authority that issued the act or to the higher authority, the injured party may ask the competent court to order the suspension of the execution of the unilateral administrative act until the court of first instance has ruled.

It therefore follows that for the suspension of an administrative act, which is a measure ordered in exceptional cases, two conditions must be met cumulatively: the existence of a well-justified case and the need for suspension to prevent imminent damage.

According to Article 11 para. 1 of the O.U.G. no. 195/2005, it is mandatory to request and obtain environmental consent for public and private projects or for the modification or extension of existing activities that may have a significant impact on the environment.

According to art. 2, point 3 of the same normative act, "the environmental agreement is the administrative act issued by the competent authority for environmental protection, establishing the conditions and, where appropriate, the measures for environmental protection, which must be respected in the case of the implementation of a project".

The combination of these legal provisions shows that obtaining the environmental consent is a stage in the implementation of a project, being the act imposing on the proposed intervention conditions and measures arising from the need to protect the environment.

Therefore, the condition of imminent damage is not met because the existence of the environmental consent allows the issuance of other administrative acts, which can be directly enforced. The imminence of the actual clearing of the forest vegetation cannot be relied on in the present case, since the clearing is not carried out on the basis of the environmental agreement, but on the basis of the decision and the authorisation for the exploitation of the timber issued by the Territorial Inspectorate for Forestry and Hunting, in accordance with the provisions of Forestry Code Law No 46/2008.

With regard to the condition of the existence of a well-justified case, the Court considers that it is not fulfilled because the examination of this condition implies the examination of the appearance of right, namely only of those cases that reveal a clear illegality of an administrative act. In an application for a stay of proceedings, the grounds of illegality which prejudice the merits cannot be examined.

Thus, the reasons relating to the non-existence of all the documents required to obtain the environmental consent (including an urban planning certificate), the division of the project into smaller projects and their separate evaluation, the incomplete nature of the evaluation report in relation to the requirements of Order 863/2002, the consultation of the public, compliance with the precautionary principle in decision-making and the principle of integration of environmental policies into all the policies and activities of the Union, with the aim of achieving sustainable development, are matters which concern the substance of the law and not the actual unlawfulness, so that they can only be examined in the application for annulment.

For these reasons, on the basis of Article 496 NCPC and Article 14 of Law 554/2004, the Court will dismiss the appeal as unfounded.

FOR THESE REASONS

IN THE NAME OF THE LAW

HAS DECIDED:

Dismisses the appeal brought by the appellant-appellant ASOCIAȚIA BANKWATCH ROMÂNIA with its registered office in Sector 1, Bucharest, Bd. Dinicu Golescu, no. 41, bl. 6, sc. 1, et. 1, ap. 5 against the civil judgment no.3469/14.06.2013 pronounced by the Bucharest Court - Section IX - Administrative and Fiscal Litigation, in case no. 17632/3/2013 against the respondent-claimant GREENPEACE CEE ROMÂNIA with registered office in sector 2, Bucharest, str. Ing. Vasile Cristescu, nr.18 and the defendants AGENȚIA DE PROTECȚIE A MEDIULUI GORJ with registered office in Târgu Jiu, str.Unirii, nr.76, Gorj county and SC COMPLEXUL ENERGETIC OLTENIA SA-SDM TG. JIU-EXPLOATAREA MINIERĂ DE CARIERĂ ROVINARI with registered office in Tg.Jiu, str. Alexandru Ioan Cuza, nr. 5, Gorj county, as unfounded.

Definitive.

Delivered in public sitting, today, 14.08.2013.

PRESIDENT	JUDGE	JUDGE
BÎCU VASILE	POHRIB ALINA	JABRE AMER

REGISTRER

SĂFTESCU ELENA

Red. jud. B.V.

Tehnored. S.E./6ex.

Jud. fond Cristina Ilina, TB - IXth Section

Com. 4 ex/