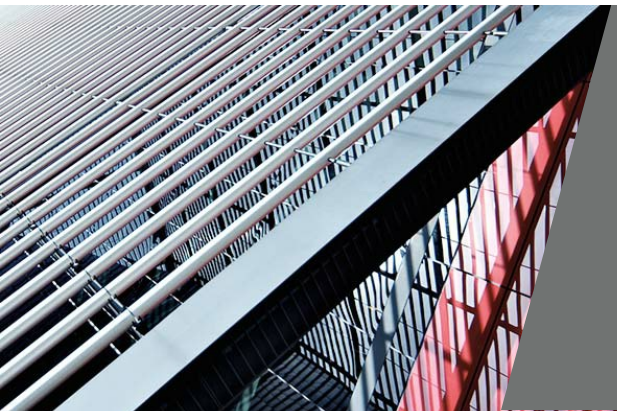

LABOR AND EMPLOYMENT

INCLUSION OF COMPANIES IN CASES IN THE EXECUTION PHASE

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TST decision privileges discussion on the topic and can bring legal security to the market

The deputy chief judge of the Superior Labor Court (TST), Justice Dora Maria da Costa, recognized, on May 20, the general repercussion of extraordinary appeals RE 1387795 (filed in the record of Labor Action 0010252-81.2015.5.03.0146) and RE 1387794 (filed in the record of Labor Action 0010023-24.2015.5.03.0146), both represented by the law firm Machado Meyer.[1]

The issue is possible violation of the right to due process of law, the adversarial process, and a full defense, as well as of the principle of legality, when companies are included in the as defendants in labor proceedings in the execution phase, due to alleged joint and several liability with the principal debtor.

On May 24, the Justice clarified that, while the Federal Supreme Court (STF) has not analyzed the controversy over the existence of general repercussion and whether the Labor Courts have violated the principles cited, the decision to suspend proceedings that deal with the issue will be incumbent on each reporting judge for the corresponding appeal within the TST and the TRTs.

In any case, with the Justice's decision, all the cases that reach the deputy chief judge's scrutiny will be put on hold, as in the cases that gave rise to the aforementioned decision, highlighted above.

Understand the case

In the case under discussion, the company that filed the Extraordinary Appeals in question was surprised by its inclusion in as a defendant in the claim when the case was already in the execution phase, after the bankruptcy of the principal debtor company was found.

At the time, the Regional Court of Labor Appeals for the 3rd Circuit (Minas Gerais) upheld the decision handed down by the Judge of the Labor Court of Nanuque, which recognized the existence of an economic group between the judgment debtor company and the main debtor, on the understanding that there was coordination between the companies, and ordered the inclusion of the former as a defendant and its summons to pay.

The TST did not accept the appeals initially filed by the company. However, when reviewing the extraordinary appeal, the deputy chief judge of the TST recognized that the matter under discussion is extremely controversial and must be decided by the STF.

The decision that guarantees suspension of the proceedings in the enforcement phase in which companies are included as defendant without having the right to an adequate defense in the fact-finding phase is of utmost importance. One of the reasons is the need to guarantee the effectiveness and correct application of the provisions of article 2 of the CLT and its respective paragraphs, if the STF decides that it is impossible to include companies at such a late stage in the labor proceeding.

It is not difficult to understand the great injustice that companies included in the execution phase face, because at this stage of the proceeding it is impossible to discuss whether there was a legitimate formation of an economic group. This is because, for procedural reasons, once the fact-finding phase of the lawsuit has been exhausted, companies can only discuss, in the execution phase, the amounts they will be forced to pay or any direct and literal constitutional violations that do not permeate the analysis of the infra-constitutional legislation.

It is important to ponder that, although the effectiveness of judicial relief is an important constitutional principle, one cannot, under the pretext of allowing the worker the execution of his judgment debt claim, accept that this claim be borne by a company that should never have been party to the dispute. The risk is that it also violates the constitutional right that everyone has to not be deprived of his property without due process of law (article 5, subsection LIV, of the Federal Constitution).

To understand the impossibility of including in the execution phase a company that did not participate in the fact-finding phase does not mean, in any way, it is impossible to enforce a decision, but to prevent a company that should not be liable for a debt from bearing it. It is nothing more than the application of several basic constitutional precepts and guarantees, especially the principle of the adversarial process, the principle of a full

defense, and due process of law.

As well acknowledged in the decision by Justice Dora, the issue has already reached the STF through Motion to Resolve a Breach of a Fundamental Precept (ADPF) 488 and 951, which deal precisely with the unconstitutionality of including in the labor execution phase a company belonging to an economic group that did not take part in the case and is not included in the enforcement order, since this violates the fundamental guarantees of due process of law, a full defense, and an adversarial proceeding.

Although the ADPFs mentioned are still awaiting judgment, there is a good chance that the Supreme Court will decide that it is impossible to include a company that did not participate in the fact-finding phase in the execution proceeding.

This is because, on September 14, 2021, STF Justice Gilmar Mendes granted relief to an extraordinary appeal (ARE 116036) to modify the decision by the Labor Court for execution against a company in a similar situation.

The decision, in our opinion, is correct, because it guarantees application of what the law provides. According to paragraph 5, of article 513, of the Code of Civil Procedure, execution of judgment cannot be filed against the guarantor, co-obligor, or co-responsible party who did not participate in the fact-finding phase. It is incumbent on the Labor Court, therefore, to apply the law or declare the unconstitutionality of the provision.

However, the TST has failed to apply the legal provision, without having previously declared its unconstitutionality, which violates the provision that such a matter must be resolved by the court *en banc* (Federal Constitution, article 97). The TST's position also violates the STF's Binding Precedent 10, according to which the *en banc* jurisdiction rule (Federal Constitution, article 97) is violated by decisions of a single body of the appellate court which, despite not expressly declaring the unconstitutionality of a law or normative act of the Government, prevents its application, in whole or in part.

Other justices of the STF have already taken a position that it is not possible to execute the judgment against the party that did not participate in the fact-finding phase, as in the *in limine* decisions issued by Justice Nunes Marques in Constitutional Complaints 51.756 and 51.682, both handled by Machado Meyer.

Some plaintiffs' lawyers point out that it is difficult to include, in the fact-finding phase, all the companies that may be liable for the labor debt. However, this argument is not justified. It is the worker who determines the formation of the defendants in the claim.

If, on the one hand, no one is obliged to litigate against anyone they don't want to, on the other hand, it is unreasonable to think that the same worker who indicated which companies he was interested in including as a defendant in the lawsuit, could, in execution, indicate companies other than those that were part of the fact-finding phase so that they could respond for a judgment debt of which they were not even aware.

If the STF confirms the impossibility of including a company in the execution phase, it will bring about legal certainty and encouragement for companies and investors, who end up having difficulties in or even impediments to defending themselves extensively not only regarding their liability (if in fact they belong to the principal debtor's economic group), but also regarding the prayers for relief made by the worker, which are often not defended in a correct manner by the insolvent debtor.

The decision would also prevent expansion of the concept of economic group that has been promoted by the Labor Courts by finding that mere corporate and investment operations are sufficient to establish an economic group, without observing the correct corporate definition of the term.

In other words, the STF's decision can bring about legal security with a definitive solution for the issue and can certainly contribute to promotion of investments. The effect would be especially positive for the M&A and private equity market, where transactions are often incorrectly interpreted by the labor courts.

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[1] The leading cases selected by Justice Dora to represent the controversy were: case 10023-24.2015.5.03.0146, in which the 05/20 decision was issued, and case 10252-81.2015.5.03.0146, covers the same discussion and is being handled by the law firm Machado Meyer.