LITIGATION

LEADING CASE OF MESSAGES EXCHANGED VIA WHATSAPP LEADS STJ TO OUTLINE AND UPDATE THE CONCEPT OF CONFIDENTIALITY OF COMMUNICATIONS GUARANTEED BY THE CONSTITUTION

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The Superior Court of Justice (STJ) concluded the trial of Special Appeal No. 1903273/PR, under the rapporteurship of Minister Nancy Andrighi, and decided that the public disclosure of messages exchanged on the social media WhatsApp constitutes an unlawful act.

The Third Panel of the STJ maintained the understanding of the lower and the appellate court judge and, therefore, the obligation to compensate moral damages related to the illegal disclosure of prints of conversations exchanged in a group of WhatsApp, under the premise that "(...) third parties may only have access to WhatsApp messages with the consent of participants or judicial authorization."

According to the STJ, the confidentiality of communications under article 5, item XII,[1] of the Constitution of the Federative Republic of Brazil (CF) aims to safeguard the right to intimacy and privacy of citizens and, although the item deals only with the inviolability of telephone communications, in view of the advancement of technology in recent decades and the consequent advent of new forms of communication, it must also applies, by symmetry, to conversations maintained through social medias such as WhatsApp.

Minister Nancy Andrighi pointed out that since 2016 WhatsApp uses encryption to prevent conversations maintained through the application from being accessed by third parties, thus protecting the communication maintained between its users. She also considered that the dissemination of the private content of messages sent through WhatsApp configures not only a breach of confidentiality but also a violation of "(...) legitimate expectation, privacy and intimacy of the issuer", because, when using this specific social media as a means of communication, the sender expects that the message will be read only by the recipient (or recipients in the case of conversation groups).

The collegiate also reported to the analysis made by the lower and the appellate court judge on the evidential set, through which injury to the image and honor of the author of the indemnity action of origin was found, caused by the unlawful disclosure of the prints of the conversations held in a WhatsApp's group. The punishment of the person responsible for the dissemination of the messages did not result from the simple finding of the illegality of such disclosure, but rather the verification, in the specific case, of violation of the author's personality rights perpetrated by the disclosure of the messages.

For the ministers of the Third Panel of the STJ, the confidentiality of communications can only be raised:

> by judicial decision, in the case of necessary criminal investigation or procedural instruction (Article 5, item XII, CF);
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> upon consent of the participants or
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> in cases where "(...) the display of the messages is intended to safeguard the receiver's own right", and it is necessary to examine the specific case in order to consider whether the right to freedom of information or the right to privacy will prevail.

It is interesting to draw attention to the understanding of the Superior Court in criminal proceedings. The panels specialized in criminal law have established their own interpretation by the illegality of the evidence obtained from accessing messages exchanged through WhatsApp without judicial authorization , since the conduct violates the constitutional guarantees of intimacy and private life[2].

According to the Sixth Panel, "[e]ventual deletion of a message sent (in the option 'Delete only for Me') or a message received (in any case) leaves absolutely no trace, neither in the application, nor in the paired computer, and therefore can never be recovered for the purposes of evidence in criminal proceedings, and due to end-to-end encryption technology, not even the company that provides the service can store on any server the content of the conversations maintained on its platform ".[3]

Given the volume of information exchanged daily via WhatsApp, the understanding of the Third Panel of the STJ outlines and updates the concept of confidentiality of communications constitutionally assured, establishing an significant development in the protection of constitutional guarantees to the privacy and intimacy of electronic message issuers.

Notwithstanding, although it was not specifically addressed in the decision, the ministers of the Third Panel remarked that there are cases in which it will be necessary for the sender or recipient of messages exchanged via WhatsApp to use its content to defend its own right, in which case the confidentiality of messages will be raised, even without the authorization of those involved or judicial authorization.

In summary, the use of electronic messages as a means of proof still finds an unclear scenario to be delineated by

the case law, such as the considerations brought by the Sixth Panel of the STJ on the possible absence of authenticity of the messages exchanged via WhatsApp and its complete invalidity as a means of proof. With the advances in communication technologies, it is expected that the judiciary will increasingly face issues such as those dealt with in this decision, which challenge the concepts defined by the legislator and lead to the need for the judiciary to interpret them.

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[1] "XII – the confidentiality of correspondence and telegraph communications, data and telephone communications is inviolable, except, in the latter case, by authorization of a Judge, in the cases and in the form that the law lays down for the purposes of criminal investigation or procedural investigation;"

[2] Rcl 36.734/SP, rel. Minister Rogerio Schietti Cruz, Third Section, judged on 10.2.2021, DJe 22.2.2021; AgRg no AgRg nos EDcl no REsp 1842062/RS, rel. Minister Felix Fischer, Fifth Panel, judged on 15.12.2020, DJe 18.12.2020.

[3] RHC No. 99.735/SC, rel. Minister Laurita Vaz, Sixth Panel, judged on 27.11.2018, DJe 12.12.2018