[NL] Recording and sharing by a journalist of a confidential phone call with a council member was not unlawful

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In a judgment of 11 December 2018, the Court of Appeal of Arnhem-Leeuwarden ("the Appeal Court") ruled that a journalist had not acted unlawfully by taping and sharing a recording or the contents of a phone call in which a municipal council member ("the council member") provided him with confidential information.

As a party chairman, the council member was a member of a committee responsible for the appointment of an acting mayor. While the appointment procedure was underway, and days before the official announcement of the nominee, the council member spoke over the phone about, inter alia, that procedure with a journalist from a Dutch national newspaper. Unbeknown to the council member, a second journalist, who worked for a regional door-to-door newspaper, accompanied the national journalist and secretly taped the phone call which the first journalist had conducted with his phone on speaker function. After being asked about the candidate by the journalist from the national newspaper, the council member did not provide a name. He did, however, provide a profile from which the identity of the candidate was subsequently quite easily be identified by the regional journalist. Eventually, the chairman of the nomination committee found out that someone from the committee had leaked information about the procedure. The regional journalist, when asked, confirmed that it had indeed been the council member who had provided her with this information, after which she also shared the recording with the municipality council. After several complaints were received from a number of other council members, an investigation was started into the council member's wrongdoings. The council member, however, filed a complaint with the police regarding the regional journalist having taped the phone call illegally. In the subsequent criminal proceedings, the journalist was found guilty of this crime, but not punished. In a subsequent civil lawsuit, a District Court rejected the council member's submission that the journalist had acted unlawfully by recording the phone call without the council member knowing, and by making this recording or its contents available to others. The council member appealed.

In the appeal decision, the Appeal Court weighed the council member's right to the protection of his private life (which includes the right to protection of privacy and reputation) against the journalist's right to freedom of expression (which also

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encompasses the right to journalistic freedom). The Appeal Court reiterated that in balancing these rights all relevant factors and circumstances had to be taken into account. The first factor that the Court deemed of importance was the fact that the council member was a public figure and that the actions of which he accused the regional journalist concerned a matter of public interest. The council member therefore had to tolerate more severe criticism and public scrutiny than would normally be the case. Additionally, the Appeal Court considered that the fact that the council member had not known that the phone call was being recorded did not detract from the fact that he had provided confidential information in a manner incompatible with his role as member of a confidential committee and as an administrator. The Appeal Court rejected the council member's argument that he had been provoked by the journalist, deeming that asking questions was simply what journalists do. In view of the fact that the phone conversation between the journalist and the council member had concerned an important matter of public interest, the Court ruled that the regional journalist had had a broad margin of appreciation in deciding how to disclose the information and had not acted negligently by sharing the recording. The council member also argued that he had agreed to - and on multiple occasions had insisted on - confidentiality with the national journalist; however, the Appeal Court ruled that the council member, as a public figure, should have been aware of the risk that the phone conversation might be made public.

In the light of these findings, the Court of Appeal ruled that the journalist's right to freedom of expression should prevail and that the council member's appeal should be rejected. The Court upheld the judgment of the District Court.

Gerechtshof Arnhem-Leeuwarden 11 December 2018, ECLI:NL:GHARL:2018:10765, 11 December 2018, ECLI:NL:RBAMS:2018:1555

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHARL:2018:10765

Court of Appeal Arnhem-Leeuwarden, 11 December 2018, ECLI:NL:RBAMS:2018:1555.

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