[NL] Dutch broadcaster not liable for infringing former mayor’s right to private life

IRIS 2019-7:1/22

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On April 30th, 2019, the Amsterdam Court of Appeal ruled that the PowNed broadcasting organisation was not liable for broadcasting secretly taped private conversations between a former Dutch mayor and a 24-year old man with whom he was romantically involved. The Court thus overturned a judgment of 31 August 2016 delivered by the District Court of Amsterdam (see IRIS 2016-10/21).

The facts of the case revolve around Onno Hoes, who during his time as mayor of the Dutch city of Maastricht became involved in a marital scandal in 2013, when he was seen kissing another man. A year later, when the initial media storm and the political uproar surrounding the events had died down, PowNed discovered that Hoes had become romantically involved with yet another man. With help from PowNed, this man had secretly taped two meetings between Hoes and himself. The conversations between the two, during which explicit sexual language was used, were then broadcast by PowNed. As a result of the incident, in the summer of 2015, Hoes’ position became untenable and he resigned from his post. Hoes subsequently initiated proceedings in which he claimed PowNed was liable for both the material and non-material damage he said he had suffered and possibly would suffer in the future, arguing that PowNed had infringed his right to a private life. Moreover, he wanted PowNed to keep the material off the Internet and never to use it again.

The District Court had ruled that, while the use of hidden cameras and microphones was a proportionate means to report on such a matter of public debate, the broadcasting of the material had been disproportionate, given that, inter alia, the matter was already in the public domain. The court, weighing the mayor’s right to private life against PowNed’s right to freedom of expression, had eventually ruled that PowNed was indeed to be held liable; it had prohibited PowNed from using the recorded material.

In the appeal procedure, PowNed argued that the District Court had interpreted the scope of the right to freedom of expression too restrictively and had applied incorrect standards in respect of the broadcasting of the secretly recorded material.

The Court of Appeal affirmed that the fundamental rights, as well as the interests, of both parties had to be balanced, and it reiterated that this required all relevant

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factors and circumstances to be taken into account. The court acknowledged on the one hand PowNed's interest, as a public service broadcaster, in reporting in a critical, informative or cautionary way during a news programme on matters that it deemed to constitute societal malpractice. On the other hand, the court recognised the mayor's right not to be accused lightly, as well as his right to private life. In balancing the parties' interests, the court identified three factors of particular importance. Firstly, the court established that the mayor, as a public figure, had to be prepared to tolerate a higher degree of scrutiny that would normally be the case - in this case even in respect of matters concerning his private life. Pointing to several of the mayor's own declarations, the court noted that it was partly owing to his own actions that events in his private life had become linked to his political functioning as mayor. Secondly, the Court of Appeal agreed with the District Court that the use of hidden cameras and microphones had been a proportionate means of reporting on this matter and thereby contributing to a debate of general interest. The Court of Appeal did not accept the mayor's argument that he had been lured into a trap by PowNed, as he himself had been largely responsible for seeking out contact with the man. Thirdly, the court considered whether it had been necessary for PowNed to broadcast the material. In this context, the court acknowledged that this had constituted a large infringement of the mayor's right to private life. It ruled, however, that as the recordings had been made in public spaces and as the effects had been somewhat mitigated because they had only been broadcast around the time of occurrence of the events in question and had not also been made available to other parties or online, the broadcasting of the material could not considered to be unlawful. Therefore, overturning the judgment of the District Court, the Court of Appeal ruled that PowNed was not liable for broadcasting the material.

Gerechtshof Amsterdam, 30 April 2019, ECLI:NL:GHAMS:2019:1502

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHAMS:2019:1502

Court of Appeal of Amsterdam, 30 April 2019, ECLI:NL:GHAMS:2019:1502

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