[NL] Judgment on request for removal and rectification of investigative TV programme

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On 30 January 2020, the Rechtbank Midden-Nederland (Midden-Nederland District Court) delivered an important judgment, refusing to order the removal or rectification of an investigative TV programme broadcast by a Dutch public broadcaster. The litigation received a great deal of coverage in Dutch media, and the judgment set out the principles the Court will apply when determining whether there is a sufficient factual basis for investigative reporting.

The case arose on 26 November 2019, when the Dutch public broadcaster AVROTROS broadcast an episode of its long-running *Opgelicht* investigative programme. The episode concerned the Kluivert Dog Rescue Foundation in Curaçao, which was founded in 2018 by a well-known public figure from the Netherlands, and the programme raised a number of questions relating to the fate of donation funds to the Foundation. Following the broadcast, the Foundation and its founder initiated legal proceedings, claiming that the programme was "factually inaccurate", and made unlawful accusations against the Foundation and its founder, which were "biased", "one-sided and very damaging". Before the Midden-Nederland District Court, the Foundation listed 16 different accusations from the programme which it claimed were unlawful allegations, and asked the Court to order the broadcaster to remove the programme from its website, publish a rectification as a pop-up window on its website whenever the accompanying article is accessed, and write to the Google search engine with a request to urgently remove the programme from its cache memory.

The Court first held that the case involved a conflict between the claimants' right to protection of reputation under Article 8 of the European Convention on Human Rights (ECHR), and the broadcaster's right to freedom of expression under Article 10 ECHR. Notably, in rejecting the broadcaster's argument on the point, the Court held that the Foundation also enjoyed a right to protection of reputation under Article 8 ECHR, since violation of the personality rights of a legal person through damage to good name and reputation directly results in violation of the economic rights of that legal person. The Court then stated that in order to answer the question of whether Article 8 or Article 10 outweighed the other in a specific case, there must be a weighing of all the relevant circumstances of the case, namely: (i) the nature of the statements and the severity of the expected consequences for the person to whom those statements relate, (ii) the seriousness - viewed from

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the public interest - of the abuse that is denounced, (iii) the extent to which the statements are supported by the factual material available at the time of publication, (iv) the creation and presentation of the statements, (v) the authority enjoyed by the medium on which the statements are published, and (vi) the social position of the person involved.

The Court then proceeded to methodically address each of the allegations made in the programme, and dismissed all the arguments by the claimants that the programme was unlawful. Notably, the Court held that where there may be minor inaccurate statements by interviewees or third parties, "[i]n general, AVROTROS may be expected to investigate the facts, but not everything that is said to it by third parties must be checked for accuracy." Furthermore, the statements deemed incorrect were "not essential", in the sense that they "did not form the core of the broadcast." Crucially, the Court held that the "vast majority" of what had been put forward in the programme had "sufficient support in the factual material available to AVROTROS at the time of the broadcast." In particular, the Court found that questions relating to the use of certain donations were factually correct, and that nowhere did the programme explicitly make an allegation that the Foundation had engaged in "deception". The Court concluded that discussing what happened to donation funds fell within the freedom of expression of AVROTROS, rejected the claimants' application in full, and awarded costs to the broadcaster.

Rechtbank Midden-Nederland, 30 januari 2020, ECLI:NL:RBMNE:2020:304

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBMNE:2020:304

District Court of Midden-Nederlands, 30 January 2020, ECLI:NL:RBMNE:2020:304

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