UNOFFICIAL ENGLISH TRANSLATION

of the appeal judgment (arrest) of the Court of Appeal of The Hague of 12 April 2016, case number 200.183.987/01, published by the Netherlands judiciary as ECLI:NL:GHDHA:2016:870. Only the Dutch original is authoritative: https://dedoofpotgeneraal.nl/doc/arrest.pdf

Translator's notes: 'mr.' before a name is the Dutch title of a jurist holding a master's degree in law. An 'arrest' is a judgment of a court of appeal; the 'preliminary relief judge' (voorzieningenrechter) decides urgent interim proceedings. The source document is a scanned certified copy; the signatures on the final page have not been reproduced in this translation. Evident slips in the original have been rendered as they stand, marked [sic]: the spelling 'Screbrenica' in paragraph 4.12, and the date given in paragraph 4.2 for the Supreme Court judgment in Van Gasteren/Hemelrijk, which was delivered on 18 January 2008. The judiciary's own published version, reachable through the linked ECLI number above, is anonymised: it replaces the names of the parties and their places of residence with placeholders. That leaves the finding in 4.9 about the spelling of the respondent's name unintelligible there. The layout, typeface and type size of this translation follow the Dutch original.

appeal judgment

COURT OF APPEAL OF THE HAGUE

Civil Law Division

Case number : 200.183.987/01

District Court case number : C/09/497903 / KG ZA 15/1556

judgment of 12 April 2016

in the case of

EDWIN FRANCISCUS GILTAY,
residing in The Hague,
appellant,
hereinafter referred to as: Giltay,
counsel: mr. J.G.J. van Groenendaal, Amsterdam,

versus

BARBARA OVERDUYN,
residing in Zoetermeer,
respondent,
hereinafter referred to as: Overduyn,
counsel: mr. R.F. Thunnissen, The Hague.

1. The proceedings

1.1 By writ of 8 January 2016, Giltay lodged an appeal against a judgment rendered between the parties on 14 December 2015 by the preliminary relief judge of the District Court

of The Hague. In the appeal summons, with exhibits, Giltay put forward nine grounds of appeal. In the statement of defence on appeal, with one exhibit, Overduyn contested the grounds of appeal.

1.2 The parties subsequently had the case argued on 25 February 2016 by their counsel named above, both on the basis of the notes for oral argument submitted. Finally, judgment was requested.

2. The facts

2.1 The facts established by the preliminary relief judge in the judgment of 14 December 2015 are not in dispute, with the exception of the way in which the role of Overduyn in the book is described in paragraph 2.3. The Court of Appeal will therefore establish Overduyn's role in the book independently. In other respects, the Court of Appeal will proceed on the basis of the facts established by the preliminary relief judge.

2.2 Giltay is the author of the book 'De Doofpotgeneraal' (hereinafter: the book). The book was published in mid-2014 by publisher SpeakEasy (hereinafter: the publisher). The summary on the back cover of the book reads:

> What business does a military intelligence service have on the shop floor of a cable company? Why does a general have a private spy infiltrate there? And did the notorious roll of film from Srebrenica really fail to develop?
>
> As an unsuspecting citizen, Edwin Giltay becomes unintentionally caught up in an internal battle of the Military Intelligence Service, fought out within the walls of cable company Casema. Giltay is approached there to go to work as an intelligence analyst. During his time at the cable operator, the situation spirals completely out of hand.
>
> De doofpotgeneraal offers a disturbing glimpse into a world where espionage, blackmail and the unauthorised use of resources are the order of the day. Giltay reveals matters that cannot bear the light of day. And naturally he also answers that one question: who is the general keeping the lid on this cover-up?

2.3 During the period in which the book is set, namely the late 1990s, Overduyn worked for the Military Intelligence Service (hereinafter: the MID) as well as, for some time, at Casema. At Casema, Overduyn worked together with Giltay on three evenings.

2.4 Overduyn appears frequently in the book. The first time (in chapter 2, 'Two defence women'), she is referred to by her first name and surname, save that her surname is spelled as Overduin ("Besides Ina, I also get to know the new colleague Barbara Overduin"). In the book, Giltay describes having met Overduyn when both parties worked evenings at the company Casema. Overduyn is described in the book as being a spy, working for the MID, who was placed at Casema by the MID in order to recruit Giltay – who some time earlier had applied to the Ministry of Defence to become a marine and had been rejected there – for the MID. The book mentions various statements by Overduyn to Giltay about the foregoing, as well as, among other things, about i) her other work for the MID, ii) her access to personnel files at the MID and her having inspected Giltay's file kept there, and iii) her knowledge of the continued existence of a roll of film with photographs that a soldier of Dutchbat took in Srebrenica. The book also mentions that Overduyn had to leave the MID. The book states that nothing in the book is invented. The book is presented as non-fiction.

2.5 Before publishing the book, Giltay sent the manuscript to the Minister of Defence and the Minister of the Interior, with the request that they respond to it. He did not send the book to Overduyn, nor did he otherwise inform her of its publication.

2.6 Overduyn learned of the existence of the book in March 2015 after she had been approached about it by an editor of a radio and television programme.

2.7 In mid-2015 Overduyn pointed out to the publisher of the book (through her legal adviser) that the book contains many inaccuracies and that she is ascribed a role that does not correspond to reality. She asserts that her honour and good name have thereby been damaged and that her safety is at risk. She requests Giltay to cooperate in a rectification in a national newspaper, a ban on further publication, a recall of the copies already distributed, and compensation. This letter gives notice that, failing a satisfactory response, Overduyn intends to take the publisher and Giltay to court to achieve the above. Overduyn sent a copy of this letter to Giltay. The publisher informed Overduyn in response that it no longer maintains a relationship with Giltay. Giltay did not send Overduyn any response.

3. The dispute

3.1 At first instance, Overduyn claimed:

1. an order that Giltay, at his own expense, place a rectification in three national newspapers, reading:

   > "In my book De Doofpotgeneraal I have wrongly ascribed a major role to Barbara Overduyn. Everything I have written in that regard is incorrect. It is not non-fiction, but complete fiction, which I ought not to have published (or caused to be published) without her consent";

2. an order that Giltay refrain from further distribution, publication and/or reprints of the book, remove the book from the internet and keep it off the internet, and refrain from further promotion of the book at lectures, book presentations and other public utterances (hereinafter: the ban sought);
3. an order that Giltay pay Overduyn an advance on damages of €10,000,

all of the foregoing on pain of forfeiture of a penalty payment of €1,000 for each day of non-compliance with the judgment, and with an order that Giltay pay the costs of the proceedings.

3.2 The preliminary relief judge granted the ban sought, on pain of the penalty payment claimed, subject to a maximum of €100,000, and dismissed the rectification and the advance on damages claimed. In the opinion of the preliminary relief judge, the content of the book is unlawful towards Overduyn because the right to protection of Overduyn's honour and good name must in this case weigh more heavily than Giltay's right to freedom of expression.

3.3 On appeal, Giltay claims that the Court of Appeal should set aside the judgment and dismiss Overduyn's claims after all, with an order that Overduyn pay the costs in both instances. Giltay puts forward nine grounds of appeal against the judgment. In summary, they amount to the following. First, according to Giltay, the judge wrongly held that the book revolves to a very significant extent around Overduyn. The role of Overduyn in the book must be put firmly into perspective and, moreover, finds support in the facts. Second, Giltay contests the judge's finding that further distribution of the book is very harmful to her, in which regard account must be taken of Giltay's undertaking no longer to mention her name

in the next printing of the book and in statements about the book. Third, Giltay asserts that the judge based his finding as to the unlawfulness of the book on parts of the book that had not come up for discussion in the debate between the parties. Fourth, Giltay argues that the fact that he did not ask Overduyn for comment prior to the publication cannot in this case be a reason to assume unlawfulness. Fifth, according to Giltay, the judge wrongly assumed that there are serious accusations against Overduyn. The accusations in the book are directed against the Dutch State. Furthermore, this is an autobiographical work and the picture Giltay paints of Overduyn is in accordance with the truth. Sixth, Giltay contests that the description of Overduyn is incorrect on relevant points. Seventh, Giltay argues that Overduyn bears the burden of proving her assertion that she is quoted incorrectly in the book. Eighth, Giltay objects to the breadth of the ban imposed by the judge, which is directed without limitation at the future and concerns all themes from the book. Ninth, Giltay points out that paragraph 5.2 of the judgment contains an incorrect reference.

4. The assessment

scope of the dispute on appeal

4.1 Overduyn has not lodged a (cross-)appeal against the decision of the preliminary relief judge to dismiss the rectification and damages she claimed. On appeal, therefore, apart from the order for costs, the only question at issue is whether the preliminary relief judge rightly granted the ban sought (with penalty payment).

framework of assessment

4.2 In the event of a clash between, on the one hand, Giltay's right to freedom of expression, guaranteed by Article 7 of the Dutch Constitution (Gw) and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and, on the other hand, the right to respect for Overduyn's private life, protected by Article 10 Gw and Article 8 ECHR – which includes the right she invokes to protection of her good name/reputation (ECtHR 15 November 2007, no. 12556/03, Pfeifer v Austria, EHRC 2008, 6) – the answer to the question of which of these two rights weighs more heavily in the concrete case must be found through a weighing of all the relevant circumstances of the case. In this weighing, the starting point is not that precedence is to be given to the right guaranteed by Article 7 Gw and Article 10 ECHR. The same applies to the rights protected by Article 10 Gw and Article 8 ECHR. This entails that what is at issue here is not an assessment to be carried out in two stages (such that it must first be determined, on the basis of the circumstances, which of the two rights weighs more heavily, after which it must additionally be assessed whether the necessity test as laid down in Article 8(2) and Article 10(2) ECHR respectively precludes the result of that weighing), but that this assessment must take place in a single step, whereby the judgment that one of the two rights, having regard to all the relevant circumstances, weighs more heavily than the other right, entails that the interference with the other right satisfies the necessity test of the applicable paragraph 2 (see Supreme Court 19 January 2008 [sic], ECLI:NL:HR:2008:BB3210, Van Gasteren/Hemelrijk; Supreme Court 5 October 2012, ECLI:NL:HR:2012:BW9230, Endemol and SBS/A).

4.3 In addition, as Giltay has rightly observed, the Court of Appeal must assess the situation ex nunc, that is to say: the Court of Appeal must judge according to the state of

affairs as it presents itself at the time of its decision. In concrete terms this entails that the Court of Appeal must take into account, among other things, that Giltay has undertaken no longer to mention Overduyn's name in a reprint of the book and in statements about the book, whether online or not.

weighing of interests

4.4 A weighing of Giltay's freedom of expression against the right to respect for Overduyn's private life entails, for the following reasons, that the ban sought must be dismissed.

4.5 On the one hand, (an affirmation of) the granting of the ban sought would result in a serious restriction of the freedom of expression. At least part of the book, after all, concerns matters that can be the subject of a debate of public interest. Thus Giltay states in his book, among other things:

i) that the Ministry of Defence systematically rejects persons applying to the marine corps on the ground of homosexuality;
ii) that the roll of film with photographs that a soldier of Dutchbat took in Srebrenica was not destroyed by accident, but was deliberately withheld by the MID and is still in the MID's archives;
iii) that Overduyn was placed under observation because she expressed herself critically within the MID about the withholding of the roll of film, and was subsequently dismissed.

A restriction of Giltay's freedom to raise these matters and to express his opinion on them would impair the fundamental freedom of expression at its core.

4.6 On the other hand, Overduyn's interest in the granting of the ban is limited. First, Giltay has argued, uncontradicted, that no further distribution of the first printing of the book can take place because it has already been fully distributed, and that all mentions of Overduyn's name in statements about the book on Giltay's website have already been removed. To that extent, the ban sought can therefore have no effect. Second, Giltay has undertaken no longer to use Overduyn's name in any new printings of the book, including translations, nor in statements about the book (Giltay's exhibit 8, and undertaken once again before the Court of Appeal at the oral hearing). It has been neither asserted nor established that there is a real risk that Giltay will not honour that undertaking. Overduyn has argued only that the undertaking is insufficient because readers of a reprint could trace her name via the distributed copies of the first printing and via publications about the book. That possibility does indeed exist, but for the time being it is not plausible that a considerable number of readers of the reprint, or of any new statements by Giltay about the book, will make use of that possibility. Nor has Overduyn made clear why readers of reprints would go in search of ways to link her to one of the characters in the book.

4.7 Added to this is the fact that the criticism expressed in the book about the aforementioned social abuses is directed not against Overduyn, but against the Dutch State and a former general. Nor does Overduyn assert that the book suggests that she can be reproached in this respect. The core of her objections to the book is that she is presented in it as – in her own words – a 'garrulous' spy or 'talkative person who tells tales out of school about her work at the MID'. That is a description that is negative, but it is not a description so damaging that it must be prohibited even in anonymised form.

4.8 It further carries weight that Giltay, given the weighty interest in freedom of expression, must be allowed a considerable degree of freedom in choosing the form in which to denounce the social abuses he has identified. Giltay was therefore free to choose – what he himself refers to as – an 'autobiographical form', that is to say a form in which the argument about those abuses is substantiated with his own experiences. That form entails that (the author's perception of) the conduct and statements of persons who are not public figures but do play a role in the story, such as Overduyn, are also described in detail. Therefore the reliance on freedom of expression succeeds not only in respect of the parts of the book that deal with the role of the Dutch State and a former general, but also in respect of the parts describing the conduct and statements of non-public figures, certainly if those persons are referred to by fictitious names, as Giltay has undertaken to do with regard to Overduyn.

4.9 Overduyn's objection that the book contains all kinds of inaccuracies about her cannot lead to a different judgment. The only inaccuracies that are undisputed between the parties concern her age (34 instead of 40) and the spelling of her name ('Overduin' instead of 'Overduyn'). Those limited errors are, as such, insufficient for assuming so serious an infringement of Overduyn's rights that a ban on publication of Giltay's book is justified. Unlike the preliminary relief judge, the Court of Appeal holds that these inaccuracies are also insufficient to cast doubt on the meticulousness with which Giltay proceeded in writing the book. As regards the spelling of the name, this is underlined by Giltay's explanation that he adopted that spelling from a note drawn up by the MID in the context of the Ombudsman's investigation (Giltay's exhibit 14) and by the fact that Overduyn herself does not spell her name in the correct manner in a letter she sent in the context of that same investigation (Giltay's exhibit 22).

4.10 As regards the other parts of the description of Overduyn, it cannot be established in these preliminary relief proceedings to what extent they are correct, partly because the description consists in significant part of a rendering of oral conversations between Giltay and Overduyn. What is established, however, is that the role Overduyn plays in the book, contrary to what she suggests, is not 'purely invented' or 'complete fiction'. Thus it is established between the parties:

i. that in the relevant period Overduyn and Giltay both worked evenings at Casema;
ii. that Overduyn in that period also worked for the MID;
iii. that Overduyn and Giltay, during their work at Casema, spoke about Giltay's application to the marine corps and that Overduyn advised Giltay about applying to the MID.

This is not to say that the entire description of Overduyn in the book is correct, but it does indicate that that description finds at least partial support in the facts.

4.11 The fact that Giltay did not ask Overduyn for a response before publishing the book cannot lead to a different judgment either. It is not in dispute that the right to be heard in reply is not an absolute right and that the distribution of a book is thus not unlawful merely because not all persons figuring in the book were asked for a rejoinder. The absence of an opportunity to be heard in reply is indeed a circumstance that carries weight, but in this case that circumstance does not tip the scales in Overduyn's favour, partly because the criticism of social abuses that Giltay expresses in the book is directed not against Overduyn, but against the State and a former general.

4.12 Overduyn's argument that she runs a safety risk because an (ex-)serviceman with a

Srebrenica past and post-traumatic disorder could take offence at the indiscretion attributed to Overduyn in the book concerning the roll of film cannot lead to a different outcome either. In so far as (ex-)servicemen with a Screbrenica [sic] past might take offence at that alleged indiscretion, it is for the time being not plausible that a real safety risk for Overduyn would flow from it, partly in view of the fact that it has been neither asserted nor established that safety incidents have occurred following the publication of the first printing of the book or the publicity surrounding it. Overduyn has also not put forward any concrete indications of a threat, or otherwise substantiated the alleged safety risk, while Giltay has expressly contested the risk with reference to a message on the subject from the chairman of the Dutchbat 3 Association (Giltay's exhibit 1).

conclusion

4.13 On the basis of the foregoing, it must be concluded that the grounds of appeal directed against the granting of the ban (with penalty payment) succeed. The Court of Appeal will therefore set aside that part of the judgment. In view of this, a separate discussion of the grounds of appeal can be dispensed with.

4.14 Overduyn will, as the unsuccessful party, be ordered to pay the costs of the proceedings in both instances.

5. The decision

The Court of Appeal:

5.1 sets aside the judgment of 14 December 2015 rendered between the parties by the preliminary relief judge of the District Court of The Hague, in so far as the ban sought and a penalty payment attached to it were granted and Giltay was ordered to pay the costs of the proceedings;

and, to that extent adjudicating anew:

5.1.1 dismisses the ban sought;

5.1.2 orders Overduyn to pay the costs of the proceedings at first instance, assessed on Giltay's side at €78 for court registry fees and €816 for counsel's fees;

5.2 affirms the judgment in all other respects;

5.3 orders Overduyn to pay the costs of the proceedings on appeal, assessed on Giltay's side to date at €314 for court registry fees, €94.08 for bailiff's costs and €2,682 (3 points × €894) for counsel's fees;

5.4 declares the orders for costs provisionally enforceable.

This judgment was rendered by mr. P.H. Blok, mr. G. Dulek-Schermers and mr. H.J.M. Burg, and was pronounced at a public hearing on 12 April 2016 in the presence of the registrar.

[signatures not reproduced in this translation; the copy bears the certification stamp 'Certified copy, the Registrar of the Court of Appeal in The Hague']