UNOFFICIAL ENGLISH TRANSLATION

of the judgment in preliminary relief proceedings (kort geding) of the District Court of The Hague of 14 December 2015, case / cause-list number C/09/497903 / KG ZA 15/1556, published by the Netherlands judiciary as ECLI:NL:RBDHA:2015:15050. Only the Dutch original is authoritative: https://dedoofpotgeneraal.nl/doc/censuurvonnis.pdf

Translator's notes: 'mr.' before a name is the Dutch title of a jurist holding a master's degree in law. The 'preliminary relief judge' (voorzieningenrechter) decides urgent interim proceedings. The source document is a fax copy; fax markers and 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 reference in paragraph 5.2 to '4.11', whereas the moderation arrangement is set out in 4.12, and the spelling 'Thunissen' of the name of the claimant's counsel, R.F. Thunnissen. One further slip has been repaired rather than reproduced: in paragraph 4.3 the original states that a hearing of both sides did take place, the word 'geen' (no) having evidently dropped out; the translation follows the manifest intention. The judiciary's own published version, reachable through the linked ECLI number above, is anonymised: besides the names of the parties and the places of residence mentioned, it replaces with placeholders the rank and name of the former general, the first names of two other people appearing in the book, and the claimant's name within the quoted passages. That leaves the finding in 2.3 about the misspelling of her surname unintelligible there. The layout, typeface and type size of this translation follow the Dutch original.

judgment

DISTRICT COURT OF THE HAGUE

Commercial Team – preliminary relief judge

case / cause-list number: C/09/497903 / KG ZA 15/1556

Judgment in preliminary relief proceedings of 14 December 2015

in the case of

Barbara Overduyn,
residing in Zoetermeer,
claimant,
counsel: mr. R.F. Thunissen [sic], The Hague,

versus:

Edwin Giltay,
residing in The Hague,
defendant,
counsel: mr. J.G.J. van Groenendaal, Amsterdam.

1. The proceedings

1.1 The course of the proceedings is evidenced by:
- the writ of summons and an exhibit subsequently submitted by the claimant (the book referred to below);
- the exhibits submitted by the defendant;
- the oral hearing held on 27 November 2015, at which the defendant submitted notes for oral argument.

1.2 At the hearing, judgment was scheduled for today.

2. The facts

On the basis of the documents and the proceedings at the hearing, the following is assumed in these proceedings.

2.1 The defendant 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 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?"

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

2.3 The claimant 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, the defendant describes having met the claimant when both parties worked evenings at the company Casema. The claimant is described in the book as being a spy, working for the Military Intelligence Service (hereinafter: the MID), who was placed at Casema by the MID in order to recruit the defendant – 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 the claimant to the defendant about the foregoing, as well as, among other things, about i) her other espionage activities, ii) her access to the personnel files at the MID and her having inspected the defendant's file kept there, and iii) her knowledge of the continued existence of a roll of film of Serbian war crimes which, according to the Ministry of Defence, had been lost (hereinafter: the roll of film). The book also mentions that the claimant had to leave the MID. The book states that

nothing in the book is invented. The book is presented as non-fiction.

2.4 Before publishing the book, the defendant 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 the claimant, nor did he otherwise inform her of its publication.

2.5 The claimant learned of the existence of the book in March 2015.

2.6 In mid-2015 the claimant 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 the defendant 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, the claimant intends to take the publisher and the defendant to court to achieve the above. The claimant sent a copy of this letter to the defendant. The publisher informed the claimant in response that it no longer maintains a relationship with the defendant. The defendant did not send the claimant any response to this.

2.7 At the time of the oral hearing in these proceedings, several chapters of the book, including chapter 2, were online on the publisher's website.

3. The dispute

3.1 The claimant claims, stated succinctly:

1. an order that the defendant, 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 the defendant 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;
3. an order that the defendant pay the claimant 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 this judgment, and with an order that the defendant pay the costs of these proceedings.

3.2 To that end the claimant – in summary – argues as follows. She is mentioned by her full name in the book, which contains many inaccuracies and lies about her person, her role and the statements she has made. In the writ of summons the claimant names various examples of the inaccuracies. In summary, the claimant asserts that she is portrayed as someone who held an espionage or intelligence position at the MID and was placed at Casema in order to recruit him for the MID, whereas she merely held an administrative position at the MID and only worked at Casema in the evenings to earn something extra. She is furthermore portrayed as indiscreet and garrulous, and statements are attributed to

her which she never made at all, namely among others the statements referred to under 2.3. Mention is also made of incidents that did not take place, and it is stated that she was dismissed from the MID, whereas she was granted an honourable discharge. All this is the more serious because the defendant states in the book that nothing in it is invented and that it is non-fiction. She was never informed by the defendant of his intention to publish the book, nor, afterwards, of the existence of the book. The defendant has thereby damaged her honour and good name, endangered her safety and caused her (psychological) harm. He has thereby acted unlawfully towards her.

3.3 The defendant puts forward a reasoned defence which, in so far as necessary, will be discussed below.

4. The assessment of the dispute

4.1 This case concerns a clash between two fundamental rights, namely, on the defendant's side, the right to freedom of expression and, on the claimant's side, the right to protection of her honour and good name. The answer to the question of which of these two rights weighs more heavily in the present case must be found through a weighing of all the relevant circumstances of the case.

4.2 In general terms, the following can be established with regard to the book. Even if it is assumed that the book is not about the claimant but about the role played by former General Van Baal in the affair concerning the failure of the roll of film, as the defendant asserts, it must be established that the claimant does play a very important role in the book. From chapter 2 onwards she appears very frequently in the book; the defendant describes who she is, what her work entails, and how she behaves and expresses herself in his presence. In the process, she is unmistakably cast in a negative light. The claimant's description of the way she is portrayed in the book, as set out under 3.2 – put very briefly: as a highly indiscreet spy – is endorsed by the preliminary relief judge. By way of illustration, a number of passages from the book are quoted below. This is a small selection from the many passages in the book devoted to the claimant.

"In answer to my question, Barbara immediately starts complaining about the workload and stress at the MID. She tells me there is a great deal of fuss about the notorious roll of film from Srebrenica. (...) She tells me I should not really believe that the roll of film was ruined during development. The roll is simply in the MID's archive."

"Barbara feels so at ease that she proposes talking about early love experiences. She wants to know from my female colleagues what their 'first time' was like. (...) Despite her goosebumps, Ina chooses to engage with the probing questions of Barbara, who behaves as if she were in a lesbian club."

"Barbara sighs that she wants to leave the MID because she is going 'completely mad' there. (...) Although as a civil servant she is forbidden to take a second job, Barbara says she and her girlfriend can put the extra income to good use. For she has no savings, because she spends a great deal on parties and leather trousers."

"Barbara cannot stop talking about the need for information on the warring parties, and then goes on to complain about the atmosphere at the MID, which has been badly poisoned by intrigues. Almost everyone is leaving the MID."

"Not much later, Barbara gives me yet another piece of advice. I should considerably embellish my work experience and skills in my letter of application. (...) The MID does not check everything anyway. When she came to work there she did not yet know this, but over the years she has come to experience it that way. (...) It irritates me that Barbara

takes committing forgery so lightly, as if this were normal in intelligence circles."

"So I ask my uncle whether the name Barbara Overduin means anything to him. (...) He still remembers Barbara vividly. He had been so annoyed by her. He bluntly calls her a 'brazen dyke!'. In his anger he adds that Barbara comes from Scheveningen and is a common woman without manners."

"Jasper tells me that on 1 October 1998 Barbara leaves the MID amid much quarrelling and commotion, departing from Casema on the same day as well."

"Jasper too puts his experiences at Casema in writing. Thus he makes two statements about the possibly criminal conduct of Barbara, who told tales out of school about state-secret files."

"I had deliberately spared Barbara because she had already been punished with her dismissal from Defence."

"Barbara, unlike Ina, I had still seen now and then. I ran into her at the Albert Cuyp market and in Amsterdam's nightlife. Even though I try to ignore Barbara, I see her trembling with fear. While I am comfortable in my own skin and often feel shamelessly happy, Barbara is scared to death. The awkward situation makes me realise that a spy cannot consider herself anonymous in our little country. She quickly loses face."

Since the claimant is mentioned in the book by her first name and surname, the passages quoted here, among others, paint a very negative picture of her, as a result of which she may suffer harm.

4.3 In assessing the question whether further publication of the book must be prohibited and whether the defendant must place a rectification, it is relevant, among other things, that – in so far as it should be assumed at all that the statements of the claimant as quoted in the book were indeed made by her (something that is by no means established) – the claimant did not make her alleged statements in a situation in which she had to reckon with their being brought into the public domain. It can further be established that the defendant did not ask the claimant for a response concerning what he wrote about her in the book – he did not inform her of the existence of the book at all – and thus no hearing of both sides took place. Asking the claimant's former employer (of almost fifteen years earlier) for a response cannot be regarded as such.

4.4 An important circumstance to be taken into account in the weighing exercise further concerns the question whether what is stated about the claimant in the book finds sufficient support in the available factual material. The claimant has, after all, an interest in not being lightly exposed to publicity harmful to her and/or to accusations that find no or insufficient support in the available factual material. That is all the more important because the defendant expressly states in the book that everything in it is true and that it is non-fiction.

4.5 The claimant has argued, with reasons, that the book contains many inaccuracies, and to that end she has named various examples of factual inaccuracies and of statements which she asserts she did not make. It has sufficiently emerged that a number of factual points are incorrect. This concerns, for example, the incorrect spelling of the claimant's surname in the book – about which the defendant remarked that he did not know how her name was spelled – and the mention of an incorrect age of the claimant. It must be conceded to the defendant that these inaccuracies are not essential and do not substantially adversely affect the claimant's personal life, but this does raise questions as to the degree of meticulousness with which the defendant proceeded in writing his book. More important

elements which, according to the claimant, are at odds with the truth further concern the assumption that the claimant was a spy for the MID, who was stationed at Casema in order to recruit the defendant for the MID. She asserts that she was an administrative employee at the MID and worked at Casema in the evenings to earn some extra money. The claimant also expressly disputes that she made statements to the defendant about espionage activities, about the roll of film, or about having inspected the defendant's personnel file at the MID.

4.6 In view of these reasoned assertions by the claimant, the defendant could not confine himself to the mere defence that everything is based on truth. It was for him to substantiate his defence further and to explain further on what basis the correctness of what is stated in the book about the claimant can be assumed. This, however, he has not done, or has done insufficiently. In this context he has merely referred to his own notes – made at a later moment – and to anonymous sources. The preliminary relief judge considers that plainly insufficient. As regards the latter, it was in any event for the defendant to make it plausible that these sources are reliable, which he has failed to do. The foregoing leads to the conclusion that the book contains harmful publicity and accusations that find no support in available factual material.

4.7 The defendant has an interest in being able to express himself in public in a critical, informative, opinion-forming or warning manner, in order to prevent abuses affecting society from being allowed to persist through a lack of awareness among the public. In this connection the defendant has pointed out that the book concerns the role played by former General Van Baal in the affair concerning the failure of the roll of film. Raising possible abuses that have taken place in this context can be regarded as an interest deserving of respect. When asked at the hearing, however, the defendant was unable, or insufficiently able, to explain further why, in view of that specific interest, it was necessary to mention the claimant in the book by her full name. The defendant's response to that question – that he had no contact with her and that she, unlike other people appearing in the book, had not requested anonymity – cannot be accepted. The defendant, after all, deliberately refrained from informing the claimant about the matter prior to the publication of the book. Whatever else may be said of that, this too offers no explanation of the necessity of mentioning the claimant in the book by her full name. Nor has any other reason been given for this, even though it must be assumed that this was indeed a deliberate choice on the defendant's part. Other persons appearing in the book do, after all, remain anonymous. Any consequences of the choices the defendant has made in this regard are, in the opinion of the preliminary relief judge, at his own risk.

4.8 Weighing the aforementioned circumstances and interests, the preliminary relief judge is of the opinion that the defendant, in publishing the book, has acted unlawfully towards the claimant and that her right to protection of her honour and good name must in this case weigh more heavily than the defendant's right to freedom of expression. That leaves the question of what consequences must be attached to this.

4.9 Now that the defendant has indicated that he may wish to have a second printing of the book published, and more people would then be able to become acquainted with the – unlawful – content of the book, the preliminary relief judge considers it justified

to prohibit this, as claimed by the claimant under 2. A less far-reaching order, such as not mentioning the claimant's full name in the reprint, as the defendant has offered, is considered insufficient by the preliminary relief judge. On the basis of the earlier edition of the book, as well as with the help of the internet, the claimant's full name can, after all, easily be traced by readers of the reprint. Nor can an edition in which the person of the claimant no longer appears in the story suffice, in view of the very large role she plays in the book. Incidentally, the defendant has not mentioned this as a possibility either. The other claims under 2 are also considered allowable by the preliminary relief judge, in view of the defendant's unlawful conduct and the harm already caused, which can no longer be undone. To the order to remove the book from the internet, however, it will be added that the defendant is bound to do so only in so far as this lies within his power. It has, after all, emerged that the publication on the internet of part of the book originates from the publisher of the book, with which the defendant currently no longer maintains any relationship.

4.10 The preliminary relief judge does not consider the rectification claimed under 1 an appropriate measure. A rectification would above all have to be directed at the people who have become acquainted with the unlawful publication, and the preliminary relief judge considers it not plausible that a rectification in the manner claimed would achieve this. Moreover, a rectification does not ensure that persons who look up the claimant on the internet (for example, when she applies for a job) can no longer become acquainted with the unlawful publication, which the claimant considers particularly objectionable. From the claimant's assertions it can be inferred that her particular interest lies in being able to set right the picture that has been painted of her. To that end, however, she can also use this judgment. The claim under 1 will therefore be dismissed.

4.11 The claim under 3 for the award of an advance on damages is dismissed for lack of any substantiation of this claim.

4.12 The imposition of a penalty payment, as an incentive to comply with the decision to be given, is appropriate. The penalty payment to be imposed will, however, be moderated and capped. It will further be determined that the penalty payment to be imposed is subject to moderation by the court, in so far as its enforcement would be unacceptable by standards of reasonableness and fairness, also taking into account the extent to which the order has been complied with, the seriousness of the violation and the degree of culpability attaching to it.

4.13 Despite the dismissal of two claims, the defendant must be regarded as the largely unsuccessful party. He will therefore be ordered to pay the costs of these proceedings.

5. The decision

The preliminary relief judge:

5.1 orders the defendant to refrain from further distribution, publication and/or reprints of the book 'De doofpotgeneraal' and to remove the book from the internet and keep it off the internet, in so far as this lies within his power, and to refrain from further

promotion of the book at lectures, book presentations and other public utterances, all on pain of forfeiture of a penalty payment of €1,000 for each day of non-compliance with this order, up to a maximum of €100,000;

5.2 determines that the above penalty payment is subject to moderation in the manner stated under 4.11 [sic];

5.3 orders the defendant to pay the costs of these proceedings, up to now assessed on the claimant's side at €1,178.84, comprising €816 for counsel's fees, €285 for court registry fees and €77.84 for the costs of the writ of summons, to be increased by VAT where applicable;

5.4 declares this judgment provisionally enforceable to this extent;

5.5 dismisses all other or further claims.

This judgment was rendered by mr. M.E. Groeneveld-Stubbe and pronounced in public on 14 December 2015.

[signatures not reproduced in this translation]