

JUDGMENT

DISTRICT COURT OF OVERIJSEL

Cantonal and Commercial Law Team

Seat Zwolle

Case Number / Docket Number: C/08/212219 / KG ZA 17-420

Judgment in Preliminary Proceedings of 10 January 2018

in the case of

1. **[Claimant]**,
resident of [...],
2. **[Claimant]**,
resident of [...],
3. The company under foreign law
[Claimant],
established in [...],
4. **[Claimant]**,
resident of [...],
5. **[Claimant]**,
resident of [...],
6. **[Claimant]**,
resident of [...],

Claimants,

Attorneys: mr. J.A. Schaap and mr. P. de Leeuwe in Amsterdam,

versus

The company under Dutch law

YOUR HOSTING B.V.,

established in Zwolle,

Defendant,

Attorney mr. J.J. Gevers in Assen.

The parties will be referred to hereinafter as Claimant et al. and Your Hosting.

1. The Proceedings

1.1. The history of the proceedings appears from:

- The writ of summons
- The hearing
- The oral pleading notes of Claimant et al.
- The oral pleading notes of Your Hosting.

1.2. Finally a date has been set for the giving of judgment.

2. The Facts

2.1. Claimant et al. are active in the field of distribution and sale of natural stone from Iran.

2.2. Your Hosting is hosting provider of the website www.gabme.org (hereinafter: the website).

The domain name owner of the website is 'Susan Williams' in Amsterdam. The website contains two pages. On the first page of the website it is stated that GABME represents Global Advisory Board Middle East. Further on the first page it is stated:

ABOUT US

GABME is an independent international think tank, conducting analysis and research on strategic international issues in relation to the middle East.

- Counter intelligence, counter surveillance, strategic security audits
- Terrorism, ideology driven crime networks, sanctions
- Cyber crime, advance fee fraud, phishing, corporate ID theft
- Trafficking, transnational organized crime, insider threats
- Money laundering, corruption, PEP KYC, compliance, policy

Commissioned by Central Governments, Agencies, International Institutions and United Nations NGO's, GABME identifies investigates and nominates criminal organizations and individuals for prosecution.

On the second page of the website one can contact GABME by email. The only contact data of GABME stated on the website are:

GABME
London United Kingdom
E-mail: info@gabme.org

2.3. Through the internet a publication is distributed as of 1 December 2017 with the title 'International Security and Fraud Alert Iranian Fraud' (hereinafter: the report). In the report Claimant et al. are accused – summarizing – of fraud, corruption and money laundering. In the report reference is made to GABME.org. The cover page of the report states inter alia:

Author susanwilliamswork

2.4. Claimant et al. wrote by letter of 21 December 2017 of their attorneys to Your Hosting – summarizing – the following. Through the internet Claimant et al. are accused without any ground of fraud, corruption and money-laundering. In the accusations reference is made to GABME. This is an organization that does not exist. Through the internet nothing can be found about GABME. The domain name owner of the website cannot be contacted by Claimant et al. It concerns the same person who spreads the accusations through the internet. By reason of the website the accusations get some degree of legitimacy. As a result, the website itself also is of an unlawful nature. Your Hosting was asked in the letter to take down the website and to provide identifying data of the domain name owner of the website.

2.5. Your Hosting did not meet the request of Claimant et al. It wrote by email of 27 December 2017 to the attorneys of Claimant et al. that it does not see any unlawful statements on the website.

3. The Claim

3.1. Claimant et al. claim – summarizing – after amendment of their claim at the hearing that

1. Your Hosting be ordered to make the website inaccessible;

2. Your Hosting be ordered to provide the following data of the domain name owner of the website to Claimant et al. to the extent that such data are available to Your Hosting:

- i. Payment data, including bank or credit card data;
- ii. The IP addresses used upon creating the website and/or logging in including the times on which the addresses in question were used for uploading and/or logging in;

all this on the penalty of a civil fine.

3.2. Claimant et al. found the claim on the allegation that the website is part of a construction which should make it as hard as possible for Claimant et al. to remove unfounded accusations against them from the internet. According to Claimant the following method was used to that end. Firstly, the website was created. The website as such does not have any unlawful content, but it is misleading by suggesting that GABME is an existing organization which investigates malpractices by order of governments and other authorities. Next a page was created on the American hosting provider Wordpress. On said page the report has been posted. Next in the name of GABME and with references to the website of GABME the unfounded accusations from the report are distributed through Twitter and email. By reason of this construction it looks as if the accusations in the report are actually founded, i.e. on (current) investigation by GABME by order of one or more governments or other authorities. As a result, the website itself also is of an unlawful nature. Claimant et al. incur damage by this smear campaign on the internet. Orders are cancelled. Further increase of damage should be stopped. It is unfeasible to remove the posts already spread through the internet. The only option to limit the damage on a short term involves that the website is rendered inaccessible in order to remove the semblance of legitimacy of the report. Furthermore, Claimant et al. wish to hold the person(s) behind the website liable for the damage. To that end they need identifying data, seeing that they cannot contact the domain name owner of the website. Most likely, Susan Williams does not really exist.

3.3. Your Hosting pleads a defence. The allegations of the parties will be discussed in more detail below, as far as relevant.

4. The Examination

4.1. The continuous nature of the alleged unlawful acts by means of the website implies that Claimant et al. have a pressing interest in the claims. That is why the merits of the case can be examined more deeply.

4.2. The fundamental principle is that a hosting provider, like Your Hosting, is not liable for the content of the websites connected to the internet through its server, in the event that the hosting provider a) does not know of the activity or information of an unlawful nature, and in the event of a claim for damages, should not know in reasonableness of the activity or information of an unlawful nature, or b) as soon as he knows so, or should know so in reasonableness, removes the information or renders it inaccessible without delay (see Article 6:196c(4) Dutch Civil Code (DCC)).

4.3. Your Hosting finds that being a hosting provider it does not have to remove the content from the website, or parts thereof, and that it does not have to render the website inaccessible either, seeing that it is not disputed that the website as such does not include any unlawful

content regarding Claimant et al. Provisionally judging, the Preliminary Relief Judge finds that by this Your Hosting, however, interprets the provision of Article 6:196c(4) DCC too restrictedly.

- 4.4. By letter of 21 December 2017, Claimant et al. wrote to Your Hosting that on the internet unfounded accusations are made against them, that the website is used to suggest that the accusations are founded on investigations of the think tank GABME, that GABME most likely does not exist, that the same person(s) is/are behind the website as is/are behind the report and that it is impossible to contact them. By this, Your Hosting has been informed about possible unlawful acts towards Claimant et al. on the basis of the website. Next, the question is whether it is likely that this information of Claimant et al. to Your Hosting is correct.
- 4.5. At the hearing, Your Hosting acknowledged that it cannot contact the domain name owner of the website anymore either. In this, Your Hosting did not contradict that at the address in Amsterdam stated in the Whois Record of the domain name no Susan Williams can be found. Furthermore, Your Hosting did not counter that the website was created by 'Susan Williams' only two days before the report of 'susanwilliamswork' appeared on the internet, whereat in said report reference is made to GABME. In the present preliminary proceedings it remained unclear who or what 'Susan Williams' and 'susanwilliamswork' is or are. It is evident, that the names, apart from the suffix 'work', are similar. Your Hosting did not further counter that nothing can be found about GABME, neither through the internet, save the website itself. It was not alleged nor did it appear that through the internet or otherwise reports also circulate in the name of or founded on investigation by GABME, addressed at persons/entities other than Claimant et al. Furthermore, it should be admitted that it does not appear from anything that the report with the accusations against Claimant et al. is also supported by sources other than the website. All this makes it sufficiently likely, seen in connexity, that GABME is not the website of a prestigious think tank, as the website suggests, but that the website was created by the same person(s) who is/are behind the report, apparently with no other goal than being able to suggest that the report is founded on thorough investigation by order of one or more governments or other authorities, whereas it actually concerns anonymous and unfounded accusations against Claimant et al. by the person(s) behind the website and the report.
- 4.6. The Preliminary Relief Judge rejects the stand of Your Hosting that the website precisely contributes to disprove the report, because all in all, the website contains very little and only general information. Visitors of the website will continue to search in that case, and not find anything about or of GABME, according to Your Hosting. However, also if (potential) business contacts would investigate GABME further in the event that they visited the website and then do not find any further information about or of GABME either, there is a good chance that nevertheless doubt has been cast on the reputation of Claimant et al. by reason of the report combined with the website, bearing in mind the adage: there is no smoke without fire.
- 4.7. All in all, judging provisionally, the website is part of a construction of an unlawful nature, even if there is nothing unlawful about Claimant et al. on the website itself. All the information on the website serves, and apparently does not have any other goal but to make, statements about Claimant et al. of an unlawful nature, i.e. serious unfounded accusations. As a result, the entire website itself can be considered to fall within the scope of

Article 6:196c(4) DCC.

- 4.8. That claimed in 1. which regards rendering the website inaccessible, will therefore be allowed as stated below.
- 4.9. Thus, that claimed in 2. is ready for discussion. Claimant et al. wish to hold liable the person(s) behind the website, on the basis of further data of the domain name owner, for the damage they incur by reason of the misleading website. By reason of all the above, Your Hosting is held to provide the identifying data known to it, including bank data. It was not alleged nor did it appear that Claimant et al. could retrieve data regarding the domain name owner in any other way. Furthermore, a balance of convenience involves that the interest of Claimant et al. in having the identifying data provided to them outweighs the interests of Your Hosting as hosting provider and the ones of the domain name owner in not providing the data for reasons of privacy. Would this be any different, then Claimant et al. would be outlawed in case of serious accusations made anonymously, like the ones at hand (see SC 25 November 2005, Lycos v. Pessers, ECLI:NL:HR:2005:AU4019).
- 4.10. The civil fine claimed will be limited as follows.
- 4.11. Being the party found to be at fault, Your Hosting will be ordered to pay the legal costs. The costs on the part of Claimant et al. are estimated at:
- | | | |
|-------------------|-----|---------------|
| - Writ of summons | EUR | 937.31 |
| - Court fees | | 626.00 |
| - Attorney fees | | <u>816.00</u> |
| Total | EUR | 1,539.31 |
- 4.12. The claimed order to pay follow-up costs can only be allowed within the context of the present proceedings to the extent that these costs can already be estimated presently. And so, the follow-up costs will be allowed in the manner as stated below in the decision.

5. The Decision

The Preliminary Relief Judge

- 5.1. Orders Your Hosting to render and keep the website www.gabme.org inaccessible within 5 business days following the service of this judgment;
- 5.2. Orders Your Hosting to provide, within 5 business days following the service of this judgment to the counsel of Claimant et al. for the sake of Claimant et al. the following identifying data of the domain name owner of the website www.gabme.org to the extent that they are available to Your Hosting:
- Payment data, including bank and credit card data;
 - The IP addresses used upon creating said website and/or upon logging in including the times on which the addresses in question were used for uploading or logging in;
- 5.3. Orders Your Hosting to pay to Claimant et al. a civil fine to the amount of EUR 5,000.00 for each day or part of a day that it does not meet the main orders stated in 5.1 and/or 5.2, up

to a maximum of a total sum of EUR 100,000.00 reached by all the breaches of the main orders jointly;

5.4. Orders Your Hosting to pay the legal costs, estimated on the part of Claimant et al. so far at EUR 1,539.31, to be raised with the legal interest as laid down in Article 6:119 DCC on this sum as of the fifteenth day following the service of this judgment up to the day of full payment;

5.5. Orders Your Hosting to pay the costs incurred after this judgment, estimated at EUR 131.00 for attorney fees, to be raised, on the condition that the judgment has not been complied with within 14 days following the communication of the judgment and next service of the decision took place, with a sum of EUR 68.00 for attorney fees and the costs of the writ serving the decision, and to be raised with legal interest as laid down in Article 6:119 DCC on the follow-up costs as of fourteen days following the service of this judgment up to full payment;

5.6. Declares this judgment so far enforceable notwithstanding appeal;

5.7. Dismisses any further or other claims.

This judgment was rendered by mr. T.R. Hidma and pronounced in public on 10 January 2018.

(mjd)

(*signatures*)