

OFFICIAL TRANSLATION

I, undersigned, lic. Karel Thijs, LL.M., certify that I am a sworn translator with the Court of First Instance of Aruba and that the following English text, comprising 6 (six) pages, is a true and accurate translation of the original document in Dutch.

Case number: KG 74057/2015

Judgment date: June 26, 2015

COURT OF FIRST INSTANCE OF CURAÇAO

Judgment in the injunction proceedings of:

Marvelyne Fatima WIELS,

living in Rhoon, the Netherlands,

plaintiff,

attorneys: S.H.M. Helder LL.M. and A.B. van Rijn LL.M.,

against:

1. THE OMBUDSMAN OF THE COUNTRY OF CURAÇAO,

having her seat in Curaçao,

attorney: M.F. Bonapart LL.M.,

2. the public legal entity THE COUNTRY OF CURAÇAO,

whose seat is established in Curaçao,

attorney: A.K.E. Henriquez LL.M.,

defendants.

The parties will hereinafter be referred to as "Wiels," "the ombudsman," and "the Country."

Course of the Proceedings

Wiels made the allegations and claims stated in the Initiatory Petition with exhibits, filed with the court registry on June 8, 2015.

The ombudsman and the Country defended themselves and concluded that the Court should deny the requested measures. During the hearing, the ombudsman, A.M.T. Martijn LL.M., was present in person. The other parties were represented by their attorneys. An objection was filed on behalf of the Country to the acting of lawyer Van Rijn LL.M. This objection was rejected, because Van Rijn LL.M. is assisting the Curaçao lawyer Helder LL.M. and has evidently been given a power of attorney by Wiels to act on her behalf specially for this case, while he does not make a living acting like this in Curaçao.

Following further debate, a judgment was requested.

Facts

1. The Court has started from the following facts:

a. Wiels has been Minister Plenipotentiary of Curaçao in the Netherlands since June 7, 2013. She is part of the Kingdom Government, in which she represents the government of Curaçao. Liability for the behavior of the Minister Plenipotentiary lies with the Minister of General Affairs.

b. In the fall of 2014, the ombudsman, on her own initiative, started an investigation as referred to in Article 2.2 of the National Ordinance on the Ombudsman into the behavior of the Minister Plenipotentiary. The reason for this investigation were constant voices from society saying that Minister Plenipotentiary Wiels repeatedly showed behavior that raised serious questions about her integrity as representative of the Curaçao government in the Netherlands, bearing in mind that the mere appearance of dishonest behavior may have such an effect.

c. In mid-November 2014, the ombudsman was approached by an informant who had heard about the investigation and provided her with several documents. Following this, she examined, or caused to examine, ten informants in the Netherlands in December 2014 and January 2015. On the invitation of the ombudsman, Wiels was examined by her on December 16, 2014. The report of the interview with Wiels was sent to her on December 30, 2014. She did not take the opportunity to comment on this report.

d. Next, the ombudsman prepared a Memorandum of provisional findings, which was offered to the Minister of General Affairs on April 31 [sic], 2015, to allow the Minister to respond. The response of the Minister of General Affairs was received on May 7, 2015. The Minister essentially said that the ombudsman had acted against the system of the law by starting an integrity review of her own against a government official who had already been subjected to an elaborate integrity review/screening as candidate minister, while, furthermore, most of the matters raised in the Memorandum had already been discussed at a meeting of Parliament. On May 7, 2015, Wiels's counsel requested an extension of the period to respond, as well as disclosure of the names of the informants, so as to be able to examine them. On May 8, 2015, the ombudsman extended the period until May 28, 2015. By letter of May 11, 2015, Wiels responded to the Memorandum of provisional findings. Subsequently, Wiels's counsel and the ombudsman corresponded about submission of all documents used and about disclosure of the informants' names. The ombudsman refused such disclosure.

e. The ombudsman has meanwhile completed the final report, but is waiting to send it until a ruling has been made in these injunction proceedings.

Dispute

2. Wiels demands that the Court rule:

- that the names of the informants whose statements are part of the investigation file must be disclosed to her;

- that she must be allowed to examine these informants or cause them to be examined, whether or not under oath;
 - that any need to maintain the informants' anonymity must be proven by the ombudsman with objective evidence;
 - that, to the extent the anonymity is maintained or Wiels is not allowed to examine informants or cause them to be examined, those informants' statements may only be part of the investigation file if they were examined under oath by the ombudsman;
 - that Wiels must be provided with all the documents as they appear in the ombudsman's file;
 - that she must subsequently be given another reasonable period to respond (again) to the Memorandum of provisional findings;
 - that the ombudsman must be prohibited from expressing a final judgment until the above requirements have been met,
- all this while ordering the ombudsman and the Country to pay the costs of these proceedings.

3. To support her claims, Wiels alleges that the ombudsman – and therefore the Country – is acting unlawfully toward her by making use of anonymous informants and failing to provide her with all relevant documents. This is a violation of (the spirit of) Article 6 of the European Convention on Human Rights and of principles of proper government, or unwritten legal principles.

4. The ombudsman and the Country defended themselves. To the extent relevant, their defense will be discussed below.

Assessment

5. In principle, only natural persons, private-law legal entities, and public-law legal entities are allowed to act as parties to a civil trial. The parties agree that the ombudsman has no legal personality and that no exception applies in the case at hand. To the extent Wiels's claim was filed against the ombudsman, this claim is therefore inadmissible.

6. The ombudsman is a body of the Country, so that the claims should be filed against the Country. The Country has argued that, given the ombudsman's special position, the Country would be unable to move the ombudsman to comply with a possible judgment granting the claim. However, this special position does not go so far that the ombudsman can ignore a court ruling. If the Court rules against the Country, the ombudsman will therefore simply have to comply with such ruling.

7. The institute of the ombudsman is an important instrument for legal protection of citizens against the government and to promote proper government in general by the government itself. The ombudsman is appointed by Parliament, with a view to safeguarding her autonomous functioning. As High Council of State, she must assess with authority whether and when any behavior of administrative bodies is improper. In doing so, the ombudsman enjoys a high degree of discretion. The courts should therefore proceed with great restraint in reviewing the ombudsman's actions.

8. In court, it was established that Wiels meanwhile has all the documents that were used for the investigation. To the extent her claim sought submission of those documents, this claim has therefore not been maintained.

9. This leaves us with the question of the anonymous informants.

It was entirely up to the ombudsman to decide how she wished to set up her investigation and to (cause to) examine as informants, as part of such investigation, as many persons as she considered necessary, even if such informants' cooperation was subject to the condition that their identity would not be revealed. This is inherent to the early phase of such an investigation, in which as much information as possible needs to be obtained. To avoid basing her judgment on gossip and slander, the ombudsman then needed to assess the reliability of the informants thus examined. Apart from the impression those informants made during the interview, a relevant factor must have been to what extent their statements were supported by statements of others or by the available documents. Finally, the ombudsman had to decide which statements she considered reliable enough to base her final report on. This final report is not yet available, but the ombudsman told the court that statements of informants whose identities are unknown to Wiels have only been used to the extent such statements are supported by the available documents.

10. The comparison Wiels makes with the requirements for using statements of anonymous witnesses in criminal law, civil law, and administrative law does not hold up. After all, the ombudsman is not a judge and does not rule on the punishableness or unlawfulness of behavior, but limits herself to judging whether the behavior of the administrative body was or was not, in whole or in part, improper. Further, the ombudsman may make recommendations to the administrative body about measures to be taken.

11. Consequently, the procedure followed by the ombudsman does not, at first sight, appear to be unlawful, even less so given that the informants seem to have had well-founded reasons to prevent their identities – which are known to the ombudsman; to this extent, they are not anonymous – from being revealed further.

12. In this regard, the ombudsman has argued that the informants expressed fear of retaliation by Wiels. They say they have experienced repeatedly how Wiels deals with employees and third parties she does not like. They have seen, for example, how the Deputy Minister Plenipotentiary is being treated and how the head of the support services was moved away to the archives. Further, they are convinced that they should not expect any protection from the Minister of General Affairs, who, according to them, is constantly covering up Wiels's mistakes for reasons of party politics.

13. Because a final report is not yet available, the background to this fear will have to be found in the Memorandum of provisional findings.

14. According to this Memorandum, one informant stated that when Wiels took office, she told the Deputy Minister Plenipotentiary, in the presence of everybody, that he had to do this and that,

that he should not interfere with personnel matters, and that he had to report once a week. According to the informant, the minister remained silent.

According to the Memorandum, Wiels notifies the Deputy Minister Plenipotentiary in writing whenever she is going to be absent, telling him that the daily management of the Cabinet remains with the acting director, who, if required, will consult with Wiels, and urging the Deputy Minister Plenipotentiary to refrain from giving instructions to the personnel, from calling personnel meetings, and from making any political statements in the media. If he needs to travel in connection with his work, he will have to use the official car that has been made available to him. The acting director is requested to strictly enforce these agreements, according to these letters, one of which has been included in the Memorandum.

According to statements of informants included in the Memorandum, the following was purchased for the Curaçao House in 2011: a BMW 825i Sedan for the Minister Plenipotentiary, and two Volkswagen Passats, for the Deputy Minister Plenipotentiary and the director. When the current Deputy Minister Plenipotentiary took office, the Passat that was meant for him, which Wiels allegedly found too expensive, was exchanged for a Seat Mini, which hardly offers enough room for him given his stature. This Seat Mini is the only official car equipped with a track & trace device, which allows the location and the movements of the car to be tracked at all times.

In her response of May 11, 2015, Wiels stated, among other things, that her relationship with her deputy is a business relationship, even though it may sometimes be somewhat influenced by his transition from director of 18 years to the office of Deputy Minister Plenipotentiary, and that an official car has been available to him ever since he took office, in accordance with his National Decree, which does not specify the make, type, or size of the car.

15. According to the Memorandum, on March 27, 2015, the Curaçao House website stated that the Administration Department is responsible for the smooth running of activities within the Cabinet and that this department is divided into the sections Recruitment & Selection, Finance, Registration and Archives, and Front Desk, Courier, and Chauffeur. All four sections fall under the direct authority of the Cabinet's director.

According to statements of informants included in the Memorandum, the man who for years had been head of this department (formerly support services) was told, when Wiels arrived, that he was no longer in charge of Finance and was only allowed to handle the archives, where, together with the chauffeur, he sorts the little mail that comes into the Curaçao House. The informants consider this an erosion of the office and a punishment.

During the interview held on December 16, 2014, Wiels said, among other things, that the person in question is still head of support services, including Finance, but that his current job description is different. He is now handling matters that are very important to the organization, namely (the project of digitalization of) the archives, which he is very good at. She does not know whether his office has been eroded.

16. In court, Wiels's attorney spoke rather light-heartedly about reprisals such as being banished to the archives or being assigned a "Mickey Mouse car." For anonymity to be acceptable, he said, required justified fear for the witness's life, health, or safety, or disruption of the witness's family life or social-economic existence.

17. That is, however, a standard for examining anonymous witnesses in a civil trial which, as stated earlier, does not apply here. If high-ranking persons within the organization are treated in front of the other staff as described in these examples, then such treatment is disparaging and humiliating. If this treatment moreover comes from the highest chief of the organization, while it appears that no support is to be expected from the responsible minister, then such treatment is intimidating and lower-ranking officials will think twice before voicing any criticism. In such case, an *ex officio* investigation by the ombudsman is a last resort. It would have little effect if the "whistle-blowers" could subsequently be subjected to interrogation or other actions by the very person they expect reprisals from.

18. The conclusion is that, considering the ombudsman's high degree of discretion, the nature of an investigation by the ombudsman, the limited use the ombudsman plans to make of statements of anonymous informants, and the reasons for not further revealing their identities, the ombudsman has not acted unlawfully.

19. The requested measures will therefore be denied, and Wiels will be ordered to pay the costs of these proceedings, calculated on the Country's side at ANG 1,000.00 in professional fees for each of both attorneys. There is no reason to order payment of the actual costs of legal assistance.

Decision

The Court:

Administering justice in injunction proceedings

- declares Wiels's claim against the ombudsman inadmissible;
- denies the other measures requested;
- orders Wiels to pay the Country's costs, calculated at twice ANG 1,000.00;
- declares this order to pay costs enforceable notwithstanding appeal.

This judgment was given by A.J. Beukenhorst LL.M., member of the Court of First Instance of Curaçao, and pronounced in open court on June 26, 2015, in the presence of the clerk.

[2 illegible signatures]

Lic. Karel Thijs, LL.M., lawyer and sworn translator