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Football Club held Liable in Dutch Court for failing to take Measures against Racist Chanting

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1. INTRODUCTION

The phenomenon of supporters' misconduct is usually connected to violent outbursts between football fans, such as in Heysel in 1985 and Nancy in 2005. A different kind of misconduct, namely acts of racist or discriminatory nature, has become more frequent in and around the football arenas. Some recent examples are the racial remarks from Luis Suarez towards a fellow football player after which he was banned for eight matches and fined £40'000 by the FA and the monkey chants expressed by Bulgarian supporters directed at England players during the Euro 2012 qualifier match between England and Bulgaria in Sofia. The Bulgarian Football Union was fined € 40'000 by UEFA for its fans' abuse.¹ Usually these affairs are researched and dealt with by the respective associations, such as FIFA, UEFA or the national governing bodies. However, this practice does not exclude individuals or organisations from bringing a case before the civil judge.

In August of last year, it were anti-Semitic slogans which were the subject of a summary proceedings court case brought by the *Stichting Bestrijding Antisemitisme* (hereafter: BAN), a foundation fighting anti-Semitism, against the Dutch top league football club ADO Den Haag. On the 20th of March 2011, the club from The Hague won a match against A.F.C. Ajax from Amsterdam. During the confrontation ADO supporters frequently chanted anti-Semitic slogans such as “*Kutkankerjoden*”, “*Hamas, Hamas, alle joden aan het gas*” and “*Vriend van de joden*”². The Dutch judge held ADO liable for not having reacted to the anti-Semitic chanting of its supporters and decided that it is ADO's responsibility to prevent and react to similar outbursts at future games. This paper covers and comments on this decision, in which for the first time a Dutch court had to address the issue of supporters' misconduct.

2. CASE REVIEW

The Facts

According to its statutes, *Stichting BAN* was established to combat anti-Semitism in the broadest sense, which includes conducting legal proceedings, and to perform all further actions which relate or may be conducive to this purpose. Since March 2010, BAN has been in contact with the KNVB (the Dutch football association) and various football clubs to address the issue. However, no attempts were made to fight the chants and offensive banners.³ In a letter dated 16 March 2011, BAN requested ADO to take its responsibility against any abusive, anti-Semitic statements that might occur during the upcoming match between ADO Den Haag and Ajax, referring to the applicable regulations of the KNVB. Unfortunately, anti-Semitic slogans were chanted during the match. In a letter dated 6 June 2011, which was partly in

¹ <<http://www.uefa.com/uefa/footballfirst/matchorganisation/disciplinary/news/newsid=1717610.html>>.

² Freely translated as “Horrible Cancer Jews”, “Hamas, Hamas, Jews to the Gas” and “Friend of the Jews”.

³ Homepage website BAN: <<http://stichtingban.com/index.html>>.

response to the events that took place during the aforementioned competition, BAN requested ADO Den Haag to formulate and publish a policy stating that: (1) Anti-Semitism cannot be tolerated; (2) a stadium ban will be imposed on persons who are within the ADO Den Haag stadium and express anti-Semitic statements; and (3) in case of anti-Semitic chants at future home games the match will be stopped. This request was more or less repeated in another letter from BAN to ADO dated 20 June 2011.

Unsatisfied with the reaction to its letters, BAN demands the court to order ADO to immediately interrupt football matches when anti-Semitic chants are sung in which the word "Jew" occurs in any composition, or when chants are started with the words "*Kutkankerjoden*", "*Wij gaan op jodenjacht*", "*Wie niet springt die is een jood*", or "*Hamas, Hamas alle joden aan het gas*", under compensation of costs.⁴ At the hearing BAN has nuanced this statement and now reasons that a warning should be issued before a match is stopped.

The foundation argues that the repeated and offensive anti-Semitic chants generated by the public during the match are totally unacceptable in a civilised society. According to the applicable law and regulations of the KNVB, ADO was required to act promptly against the chanting by stopping the match, which was within its power, and acted unlawfully by failing to do so. In reaction to the letters from BAN it appears that ADO is not prepared to immediately stop a match should a similar situation occur in the future. According to BAN it is thus imperative that it is established that a professional club must take immediate action against anti-Semitic chants. Moreover, upholding the claim will create clarity for BAN, the spectators and the clubs and send a clear signal. ADO defends itself by arguing that the chants were not massive and only short-lived and, furthermore, that it did not notice the chants.

Legal Framework

At first glance this case does not seem very complex. However, the amount of different rules and regulations that are applicable their coherence requires some examination. First of all, it is important to note that there is no formal relationship between the two parties, which means that ADO has no obligations, contractual or otherwise, towards BAN. Consequently, BAN has to turn to tort law and found its claim on the general provision⁵. The foundation's main argument is that ADO has breached KNVB regulations as well as its own. This is an interesting argument since these regulations, internal rules of the KNVB and ADO, are not set out to have external effect. The relationship between ADO and the KNVB is regulated by Book 2 of the Dutch Civil Code (Corporations). The KNVB is an association and ADO is one of its members. Members' obligations ought to have a basis in the statutes of the association.⁶ Dutch association law is quite liberal in the sense that an association can set the internal rules and regulations it wishes. Herein, the association is only limited by its own statutes and the general provisions of Book 2, most notably the possibility of non-application of a rule if it is unreasonable or unfair.⁷ Thus, associations are

⁴ Pres. Rb. 's-Gravenhage, 9 August 2011, LJN: BR4406, <www.rechtspraak.nl>, § 2.1.

⁵ Article 6:162 of the Dutch Civil Code.

⁶ Article 2:27 of the Dutch Civil Code.

⁷ Article 2:8 (2) of the Dutch Civil Code.

free to create a regulatory system and apply and enforce it. In case a member does not comply with the rules, a disciplinary sanction can be imposed. In this case the KNVB did not react to ADO's lack of response to the chants, which might have been a reason for BAN to take the matter to a state court.

In its decision the court discusses the numerous internal rules and regulations in great detail starting with the KNVB standard conditions. Starting point of this document, drawn up by the national football association, is that everyone involved in football in the Netherlands, not least the audience, has an interest in football events taking place in an orderly manner. Behaviour of individuals (alone or in groups) that disrupt public order and/or safety at football events, harm the prestige and interests of Dutch football and can be a hazard to persons. The KNVB has drafted these rules to ensure orderly development in the broadest sense and to curb such disorderly and unsafe behaviour at football events.⁸ In addition, football matches are played under the statutes, regulations and other applicable regulations of the KNVB and/or organisations to which the KNVB is adhered or has become a subject to.⁹ One of the key regulations involves safety and states that "the clubs that are involved in a match are responsible for the preparation and implementation of the security" and that "they also have the task to take immediate action to prevent or eliminate disturbances before, during and after a match".¹⁰ Furthermore, this regulation includes the obligation of clubs to take measures against verbal abuse and refers to yet another directive, which contains the following policy principles:

- a) In principle, BVOs¹¹ and fan clubs are responsible for the conduct of their supporters or members;
- b) BVOs and fan clubs are responsible for laying down tolerance limits regarding unwanted chants or verbal abuse. These limits are published in the by-laws; and
- c) BVOs and fan clubs make every effort to counter unwanted verbal abuse or chanting, which includes both prevention as well as taking repressive measures. This means that instigators and perpetrators are to be held accountable for their behaviour.¹²

In addition, this directive includes the responsibility of the clubs to set rules on taking immediate action against unwanted chanting. In order to meet this obligation, ADO has implemented the following rule: "It is prohibited to behave in a way that may be experienced as provocative, threatening, abusive or discriminatory by others, or to act as a nuisance or to disturb the peace and order in the ADO Den Haag stadium in any way. This includes the chanting of slogans that others may perceive as discriminatory".¹³

⁸ *Koninklijke Nederlandse Voetbalbond Standaardvoorwaarden*, Inleiding.

⁹ Article 6 of the *Koninklijke Nederlandse Voetbalbond Standaardvoorwaarden*.

¹⁰ Art. 1 *Handboek Veiligheid* (Handbook Safety) 2010/11: "De bvo's die bij een wedstrijd zijn betrokken, zijn tevens verantwoordelijk voor de voorbereiding en uitvoering van de veiligheidsmaatregelen. Zij hebben ook de taak vóór, tijdens en na een wedstrijd onmiddellijk maatregelen te nemen om ongeregelheden te voorkomen of te beëindigen."

¹¹ BVO translates as Professional Football Organization.

¹² *Richtlijn bestrijding verbaal geweld* (Directive against verbal abuse).

¹³ Art. 4.4 Huisregels (by-laws): "Het is verboden zich in het stadion van ADO Den Haag te gedragen op een wijze die door anderen als provocerend, bedreigend, beledigend of discriminerend kan worden ervaren, dan wel als hinderlijk of als enigerlei wijze de orde en rust verstorend. Hieronder valt ook het scanderen van leuzen die door anderen als discriminerend kunnen worden ervaren". <<http://adodenhaag.nl/tickets/huisregels>>.

Considerations of the Court

The court presupposes that it is the primary responsibility of a professional club to act against unwanted chants as this follows clearly from the applicable internal regulations. “*ADO is and remains thus primarily accountable and will not be able to hide behind the KNVB and/or the arbitration quartet (being the referee, assistant referees and the fourth official)*”.¹⁴ The chants sung during the match between ADO Den Haag and A.F.C. Ajax are considered to be anti-Semitic and offensive, and therefore undesirable and unacceptable. ADO’s statement that it has not noticed the chants is deemed unbelievable. In addition, around 150 stewards were in attendance in the stadium, which were all connected with the ‘command centre’. According to the court, it cannot be assumed that none of them noticed any of the chants observed in the footage. Insofar as the stewards saw no reason to mention anything, this at ADO’s risk.

The court then considers in § 3.5 that under the circumstances, based on social decency (*maatschappelijke betamelijkheid*), the KNVB regulations and its own by-laws, ADO had the duty to take immediate action against the anti-Semitic chanting. ADO’s defence, that the chants were short-lived and not massive enough, cannot detract from this duty since the only criterion in this respect is the inadmissibility of the chants, i.e. the verbal violence. Before concluding that ADO did indeed act unlawfully by not immediately taking measures against the anti-Semitic chanting of its supporters, the court makes the following remarks. In case of a single and short undesirable chant a club is not expected to take outwardly expressed action right away since the purpose of such action is to prevent or terminate the chant, which has then already happened. However, taking outwardly expressed action is required when unacceptable chants occur regularly or repeatedly. The requirement to react immediately does not entail that the match should be stopped straightaway. A club is at liberty to first try and get a hold of the situation through less intrusive measures, increasing in severity. If these measures do not produce the desired results, eventually the match will have to be stopped. ADO’s existing action plan, which was explained at the hearing, seems to meet these requirements. However, ADO is expected to act in accordance with said plan. The fact that interrupting or stopping a match can lead to organisational problems and/or risks the maintenance of public order does not relieve ADO from its obligation, as this entails that abusive chants could be tolerated. This situation should be excluded. It is ADO’s responsibility to anticipate the possibility that a match is interrupted and eventually abandoned, so that it can act fast and adequately, for instance by closely cooperating with the relevant authorities. Ultimately the summary proceedings judge commands ADO to take immediate action if, during the football matches it organises prolonged or repeated anti-Semitic chants take place, in which the word “Jew” in any composition occurs, in order to terminate these chants and to prevent new chants from happening. If necessary these measures should culminate in the abandonment of the competition.

3. ANALYSIS

Ajax’s Jewish identity?

¹⁴ Pres. Rb. ‘s-Gravenhage, 9 August 2011, LJN: BR4406, <www.rechtspraak.nl>, § 3.3.

In order to understand the complex social setting of this case, it is important to explain the particularity of the word 'Jew' in relation to Ajax. While the Dutch public has grown somewhat accustomed to this practice, further explanation is needed in order to grasp the complicated circumstances of the discussed case. The club became identified in the public mind with Jews in the 1950s and by the 1970s fans of opposing teams began to call Ajax supporters Jews, who adopted this identity in a spirit of defiance. There is no clear reason why Ajax, which was founded in 1900, became known as a Jewish club. Amsterdam has always had the largest Jewish population in the Netherlands and the club had two Jewish presidents in the 1960s and 1970s and has had Jewish players at various times. The club also has some Jews among its members, but no greater a percentage than their representation in the city's general population.¹⁵ Nonetheless, for over 30 years Ajax supporters have been identifying themselves with Jews, a practice which now appears difficult to change, and adopted the word Jew as a so-called *geuzennaam*. A 'geuzennaam' is an insulting name that the injured has come to regard as an honorary title.¹⁶ Fanatic supporters of other football teams considered Ajax's adopted name a provocation and started with the hate chants. Gradually the use of the anti-Semitic chants spread elsewhere also aiming at real Jews.¹⁷ Nowadays the chants, which originated in the stadiums, are expressed at anti-Israel demonstrations, at schools and on the street.¹⁸ As this spreading of the chants is being regretted, supporters have been addressed. Former President of Ajax, Uri Coronel, stated that he has tried to call upon the supporters to quit using the word Jew as a *geuzennaam* but did not succeed and is apprehensive about ever succeeding. Realising that the use of this name evokes unacceptable chants from supporters of opposing teams, Coronel advocates that clubs and the KNVB can interrupt matches or in the worst case even deduct three points in case of serious offensive chants.¹⁹ In May 2011, after Ajax became league champions, Amsterdam Mayor Eberhard van der Laan requested fans stop using the name Jews as well. He observed: "*It is a matter of changing this behaviour, which may take 10 years.*"²⁰ It remains to be seen if Ajax fans will ever let go of their adopted name, but at least the decision sends a signal to clubs that tolerating the chants is unacceptable and can entail legal consequences.

Rules of self-regulation as a basis for liability

Besides the social complexity of this case, it is the court's clear and direct application of the rules drawn up by the KNVB and the football club itself that is interesting from a legal point of view. In the football world it is common practice to hold clubs liable for their supporters' misconduct. The disciplinary regulations of both the FIFA and the UEFA contain provisions regarding the obligations put on the member associations

¹⁵ <<http://www.nytimes.com/2005/03/28/world/europe/28iht-jews.html>>.

¹⁶ The word 'geuzen' derives from the French 'gueux', which means pauper or beggar, but gained a positive meaning when it was assumed by those who opposed the Spanish rule in the Netherlands during the Eighty Years' War. <<http://www.etymologiebank.nl/trefwoord/geuzennaam>>.

¹⁷ Peter R. Rodrigues and Jaap van Donselaar (eds.), *Monitor Racisme & Extremisme. Negende Rapportage*, Anne Frank Stichting / Amsterdam University Press, Amsterdam 2010, p. 142-143.

¹⁸ Peter R. Rodrigues and Jaap van Donselaar (eds.), *Monitor Racisme & Extremisme. Negende Rapportage*, Anne Frank Stichting / Amsterdam University Press, Amsterdam 2010, p.143.

¹⁹ nrc.nl, 13-4-2011, <<http://www.nrc.nl/nieuws/2011/04/13/coronel-puntenaftrek-voor-ajax-bij-scanderen-joden/>>.

²⁰ *Het Parool*, 14-5-2011 p. 17.

and clubs that organise matches. As to the liability of clubs for the behaviour of their supporters, this is established based on the sole fact that the misconduct has taken place, regardless of the question of culpable conduct or culpable oversight.²¹ Several clubs have disputed the legality of these provisions after being sanctioned following supporters' violence or other misbehaviour and appealed at the Court of Arbitration for Sport (CAS). The CAS accepted the application of this rule without hesitation in the PSV Eindhoven case²², in which the club was held liable for racist chanting by its fans in 2002 and reaffirmed this line in the Feyenoord case²³, which followed one of the bigger riots in European football to date. The extensive measures that Feyenoord had taken in order to try and avoid problems with its hard-core fan base could not exonerate the club from this liability.

While the 'Directive against verbal abuse' contains a liability clause similar to the ones in the FIFA and UEFA regulations – "In principle, football clubs and fan clubs are responsible for the conduct of their supporters or members" – ADO was not held liable for the behaviour of its supporters, but merely for the fact that it remained passive and took no action whatsoever in order to end the chanting. With this approach, the court has taken an interesting direction by basing its decision in part on rules of self-regulation or private regulations.

Increasingly, private regulation has been accepted and sometimes even deliberately promoted by the Dutch legislature.²⁴ However, the *Hoge Raad*, the Dutch Supreme Court, has been apprehensive to base liability on rules of self-regulation.²⁵ Still, it has taken this approach before. A doctor omits, against hospital protocol, to provide his patient medication to inhibit thrombosis after a knee operation. The patient develops thrombosis and seeks compensation. The *Hoge Raad* considered that "since the protocol is based on the consensus between the hospital and doctors, they must adhere to the rules established by themselves".²⁶ The liability of the doctor was based exclusively on the violation of the protocol and thus on a private regulation. Unfortunately, the *Hoge Raad* has not yet been this straight forward in other fields. The precariousness of the concept of private regulation can be illustrated by the uncertain position of the Corporate Governance Code. This Code contains principles and best practice provisions that regulate relations between the management board, the supervisory board and the shareholders of all listed companies registered in The Netherlands.²⁷ The legal status of the Code has been discussed in various cases.²⁸ On one occasion the *Hoge Raad* ruled that the Code expresses the prevailing legal opinion in the Netherlands, on another it agreed with the provisional arrangement of a lower court, which forbade the

²¹ See: art. 67 FIFA Disciplinary Code and art. 6 UEFA Disciplinary Regulations.

²² CAS 2002/A/423 PSV Eindhoven/UEFA.

²³ CAS 2007/A/1217 Feyenoord Rotterdam/UEFA.

²⁴ J.B.M. Vranken, *Asser-Algemeen deel****, 2005, § 78.

²⁵ J.B.M. Vranken, 'Niets in het recht is blijvend, behalve verandering', in: *WPNR* 2004, p.6560 ff.

²⁶ HR 2 March 2001, NJ 2001, 649 (Trombose).

²⁷ Article 2-3 of the Preamble of the Corporate Governance Code. The full text of the Code can be found on: <http://commissiecorporategovernance.nl>.

²⁸ For an overview see: P. Memelink, 'De invloed van de Corporate Governance Code op het vermogensrecht', in: *Maandblad voor Vermogensrecht* 2010, nr. 3, p. 42-49.

company to deviate from principle III.6 of the Code.²⁹ Thus, in the first case the court tentatively implies that legal opinions expressed in the Code have to be considered when interpreting open norms, such as ‘reasonableness and fairness’ and social decency. In the second case, however, the court accepts the direct application of the Code. Since the application was a provisional measure, it is unclear if deviation from the Code is generally forbidden or if it was just forbidden in this case.³⁰ Nevertheless, it appears that the *Hoge Raad* is at least open to the possibility of direct application of private regulations.

Regarding the enforcement of rules of self-regulation it is important to note that non-compliance does not always evoke a reaction. The case at hand is a perfect example of this issue: the KNVB did not intervene in order to force ADO to comply with the applicable regulations. Had the KNVB reacted, perhaps the case would not have been brought before the court. Since it is the infringement of private regulations which is at hand, one has to turn to general rules of civil law in order to force ADO to adhere to these rules. According to Giesen, the non-compliance with certain standards of private regulation *can* cause liability in tort of those who ignored the rules. The rules of private regulation can hereby act as an indication for the judge in the interpretation of the open standard of article 6:162 (tort) of the Dutch civil code.³¹ It is exactly this approach that the court seems to have taken in *BAN/ADO Den Haag*. All applicable rules are examined carefully before the club’s actions, or rather the lack thereof, is being qualified as unlawful. Considering the fact that the position of rules of private regulation has not yet been clearly established, this firm stand is to be applauded and indeed sends a strong signal that compliance to self-regulation is not optional. In its concise decision, the court has made it perfectly clear that a club is expected to abide by its own rules.

4. CONCLUDING REMARKS

The decision taken by the summary proceedings court in The Hague is one of the first of its kind. Never before has a Dutch football club been held liable in a state court for failing to take measures against supporters’ misconduct. Since BAN did not demand any form of compensation, the position defended by this organisation carries even more weight. In the continuing fight against supporters’ violence this case is a step in the right direction. After all, fans come to the stadium in order to see their team play, and hopefully win, a match. When the game is being stopped or even abandoned because of unacceptable behaviour in the stadium, the supporters will hopefully learn to adjust and comply with the regulations. Nevertheless, the extent of the responsibility of clubs to control the behaviour of its fans continues to be opaque and in case measures are taken against supporters’ misconduct, the question remains whether the club will be held liable despite its efforts.

²⁹ HR 13 July 2007, NJ 2007, 434 (ABN AMRO) and HR 14 September 2007, NJ 2007, nr. 611 and 612 (Versatel)

³⁰ P. Memelink, ‘De invloed van de Corporate Governance Code op het vermogensrecht’, in: *Maandblad voor Vermogensrecht* 2010, nr. 3, p. 42-49, p. 48.

³¹ I. Giesen, *Alternatieve regelgeving in privaatrechtelijke verhoudingen*, preadvies NJV, Handelingen Nederlandse Juristen-Vereniging 2007, p. 140-141.