

Appeal Court of The Hague

Van Oosten Schulz De Korte Attorneys

Attn. Mr G.J. van Oosten

Vondelstraat 41

1054 GJ Amsterdam

25 May 2020

Subject: Progress of complaint Hohmann

Dear Mr Van Oosten and colleagues,

By letter of April 14, 2020, the Court of Appeal informed you of the progress of the complaint, stating that, based on a further position of the Attorney General and your response, the Court will decide whether and, if so, to what extent further access to the documents will be granted and how this will be done.

Before addressing that question, the course of the proceedings regarding the complaint received on 30 November 2018 will first be summarised below.

Course of the proceedings

On May 22, 2019, following the complaint, a meeting took place in council chamber in closed session, where you and your colleagues were heard. By interim decision dated 30 September 2019, the Court of Appeal declared complainant G. Hohmann to be admissible in the complaint. The court then adjourned the hearing in council chamber until December 18, 2019 and asked the Attorney General to inform the court about the documents in the underlying file and to provide the court with at least a description of what the Houston investigation entails. In addition, the Court of Appeal requested the Attorney General to make available to the Court the underlying documents, in any event the documents referred to in the Houston Statement of Facts and on which the Public Prosecution Service made its assessment. The Court of Appeal has indicated that the President of the Court, with due observance of Article 122f of the Dutch Code of Criminal Proceedings (“**DCCP**”), will determine, after taking note of the file, which documents will be made available to the complainant and his counsel (whether or not anonymized) or made available for inspection.

On 11 November 2019, the Court of Appeal received the documents – according to the DPPO most relevant - from the Attorney General. These are described in the letter of the Attorney General to the Court of 11 November 2019.

The court has taken note of the letter from Mr G.J. van Oosten dated 2 December 2019, with a request for further information.

By letter of 3 December 2019 (with the aforementioned letter from the Attorney General), the Court of Appeal informed the complainant about the progress of the complaint.

The Court of Appeal determined that the complainant must be provided access to the documents that the court received from the Attorney General and as described in more detail by the Attorney General. The court has requested the Attorney General to remove the privacy-sensitive information from the documents and to anonymize the documents where necessary. The Court of Appeal also ruled that all underlying procedural documents should be made available to the Court and asked the Attorney General to take care of this. The Court of Appeal has indicated that after taking note of the entire file, the chairman will determine - with due observance of Article 122f DCCP - whether the complainant may also have access to those additional documents. This meant that the intended hearing of December 18, 2019 could not take place.

The complainant was subsequently summoned to attend the council chamber on 18 March 2020 in order to further explain the complaint. The complainant was given access to the documents - which had now been made anonymous - which were provided to the court by the Attorney General on 11 November 2019.

The court has taken note of the letter of Mr J.Ph. de Korte dated March 6, 2020 regarding the access to documents.

The Court of Appeal has taken note of the letter by e-mail of the Attorney General dated 12 March 2020, with the official report from the public prosecutors at the Functional Prosecutor's Office in Rotterdam dated 10 March 2020, which answered the question of the court on which documents exactly the settlement agreement in the Houston investigation is based. The Attorney General has indicated that the court now has more documents than the settlement is based on. This letter (with attachment) was forwarded to the complainant by email on March 18, 2020.

The hearing of March 18, 2020 was also cancelled due to the Corona measures.

By letter of April 14, 2020, the Court of Appeal again informed the complainant about the progress of the complaint. The Court of Appeal had asked the Attorney General for a further position regarding the scope of the right of access. Subsequently, it has been determined that the complainant will be given the opportunity to respond to this and that the court will finally decide whether and, if so, to what extent further inspection of the documents will be granted and how this will be done. The letter states that on 17 June 2020 the complainant or his counsel will be given the opportunity to further explain the complaint or to explain the complaint in writing before that date.

By letter of 24 April 2020 (initially erroneously dated 11 November 2019), the Attorney General took a further position on the scope of the documents pertaining to the case, as well as which documents the complainant considers to be aware of and of which not. The Attorney General is of the opinion that the court has been fully informed by the DPPO. According to the Attorney General, the scope of the file is limited to the documents mentioned by the public prosecutors in their additional official report of 10 March 2020, which are the documents on which the settlement between ING and the DPPO is based. According to the Attorney General, the documents that do not form the basis of the settlement (i.e. the documents that do not form part of the non-reporter part) should not be considered in this case. The Attorney General then took a further position on access to the documents, divided into three categories.

On 29 April 2020, the Court of Appeal gave the complainant the opportunity to respond in writing to the further position of the Attorney General before 13 May 2020.

The court has taken note of the email message of Mr G.J. Wilts, containing a request for information and documents. The Court also took note of the response of the Attorney General on 1 May 2020.

The court has taken note of the response of mr. J.Ph. de Korte dated 12 May 2020 on the position of the Attorney General.

The complaint procedure is currently in the phase in which (the counsel of) the complainant is given the opportunity to explain the complaint in person or in writing on 17 June 2020. After that, the court will decide on the complaint, which may also mean that the defendant [ING] will also be heard in council chamber.

Decision

The court must now, with due observance of the provisions of Article 12f paragraph 2 DCCP, decide on the further access to the documents of the file by the complainant and his counsel.

The Court of Appeal must first assess the relevance of the documents in the context of the complaint and then look at the grounds for exception referred to in Article 12f paragraph 2 DCCP.

By interim decision dated 30 September 2019, the complainant Hohmann was designated as a direct interested party in the complaint, which is directed against the decision of the DPPO not to prosecute ING Bank N.V. regarding criminal offenses as shown in the Houston criminal investigation.

According to the Houston investigation, the DPPO is of the opinion that ING NL was guilty of criminal offenses in the Netherlands from 1 January 2010 to 31 December 2016. The DPPO classifies the observed conduct as illegal acts performed by a legal company within its normal business operations. When attributing the crimes committed, the organization comes first and not the individual. The DPPO therefore attributes the criminal offenses to the organization as a whole and is of the opinion that the investigation has not provided sufficient evidence to make individual criminal charges against employees and managers at ING. As a result, the Houston settlement agreement was concluded between the Dutch State and ING Bank N.V.

In assessing the complaint against ING, the court will eventually have to consider, in particular, the expediency of prosecuting ING as a legal person, given the complaints formulated on behalf of Hohmann. That there are strong indications of criminal offenses that could lead to a successful prosecution of ING is evident from the Houston investigation and the Houston transaction agreement.

The underlying documents also point to this. This framework has consequences for the scope of the complainant's right of access. For the scope of the right of access, it is also important at what stage of the procedure we are currently at. On June 17, 2020, the complainant will be given the opportunity to explain his complaint and the Attorney General will provide the court with further advice. Only then will the court consider to what extent ING will be heard as a defendant. If that is the case, ING will be given the opportunity to give its views on the complaint and to explain the grounds on which it is based. This also includes that ING can comment on the scope of the right of

access. Currently ING has formally not been given the opportunity to comment on this aspect of the procedure. The Court of Appeal has understood from the correspondence that the Attorney General has conducted with ING's lawyers and from the Attorney General's further opinion that ING objects to full access of the underlying documents on various grounds.

The aforementioned course of the proceedings shows that the complainant has already had access to the necessary procedural documents. As a complainant, Hohmann naturally has the right to information in order to be able to explain his complaint. However, this right of inspection has its limitations, in which relevance, the legal exceptions of Article 12f paragraph 2 DCCP and balancing the interests of both the complainant and the defendant are important.

First of all, the court will have to determine what the relevant procedural documents are. At the request of the court, the Attorney General has made approximately 17 binders available to the court, containing both the so-called non-reporter file and the corruption file. These documents also include the documents to which, in the opinion of ING's lawyers, legal privilege applies.

It has now been established that the Houston report is only based on the non-reporter file. The court therefore takes this file as the starting point for the right of inspection. The Court of Appeal currently believes that the complainant has no interest in inspecting the documents on which the transaction is not based.

The chairman may, ex officio or at the request of the Attorney General, exempt certain documents for the protection of privacy, the detection and prosecution of criminal offenses or for serious reasons derived from the public interest. In her further opinion, the Attorney General substantially stated which documents the complainant may have access to in this state of the proceedings. The complainant's lawyer responded substantially. The court wants to emphasize that the court has the file available in hard copy as well as digitally without any restrictions.

In applying the above-mentioned powers of the chairperson, the Court of Appeal considers the following factors to be important. First of all, the defendant [ING] does not (currently) have a say in this procedure and any objections to access to confidential documents, which are, for example, subject to legal privilege, cannot be formally brought forward and explained. In addition, it must be recognized that ING Bank has a special position in financial transactions. The brief description of ING in the Houston report shows that ING is an internationally operating bank with a Dutch banking license, which is part of the ING Group N.V. ING group is listed on the AEX and NYSE. ING Bank N.V. provides financial services such as banking and investment. The bank's clients are private individuals, small and large companies, institutions and governments. ING Bank is located in 40 countries. The Dutch Central Bank qualifies ING Bank N.V. as one of the systemic banks in the Netherlands. Systemic banks are essential for the financial system and thus for the functioning of the economy and society. In the opinion of the court, the latter applies even more in this Corona era.

After taking note of the entire file, the Court of Appeal found that, in addition to the personal data of ING employees, the file contains many other privacy-sensitive data of natural and legal persons who use ING's financial services. In this state of the proceedings, the court also takes into account the possible right of non-disclosure of the lawyers of ING.

By its very nature, the Article 12 DCCP-proceedings are of a closed nature and it is necessary to exercise restraint in disclosing information that may be harmful to the accused, who enjoys protection now that he may possibly only be heard on the complaint and its grounds after issuance of the caution in a later stage of the proceedings. However, the Court of Appeal found that not every complainant in the proceedings started by him or her against Mr Hamers and ING observed such restraint. This also plays a role in assessing the scope of the right of access in this state of the proceedings.

Based on the aforementioned statutory regulations and after consideration of all interests, seen in mutual connection and context, the Court of Appeal is of the opinion that it is now sufficient to grant (further) access to the (anonymised) documents in the file, such as advised by the Attorney General in her further position of 24 April 2020, namely the documents in categories 1 and 3 referred to by her.

As previously determined by the court - with due observance of the statutory provisions - no copies of the file are being made available.

In view of the Corona measures taken by the national government, access to the Central Desk of the court in The Hague is currently not possible.

The aforementioned documents are therefore available for inspection digitally from 27 May 2020 to 16 June 2020 at the Dutch Fiscal Intelligence Service (address: Kingsfordweg 1, 1043 GN in Amsterdam-Sloterdijk). There is ample parking space. To make an appointment, please contact Mr Peter van Leusden, telephone number [telephone number].

Access can only (after identification) be made by the complainant or his counsel.

With regard to the inspection, the Court of Appeal makes the explicit condition that no copies and / or photos are made of the documents in the file. The court expressly requests you not to disclose the content of the file documents, since it concerns a hearing in closed session and not a public hearing.

If the complainant Hohmann makes use of the right of access, he will be requested to sign a declaration that he will comply with the above conditions first.

The court understands from Mr De Korte's letter of 12 May 2020 that he wishes a hearing date later than 17 June 2020 on which the complaint can be further explained. This request is currently rejected by the court. The court also recalls that the above-mentioned letter of 14 April 2020 outlines the progress of the proceedings, with 17 June 2020 being mentioned as the hearing date. The Court of Appeal does not recognize that the three-week access period, with the necessary flexibility in terms of when access can be granted, would be insufficient for the complainant's counsel. The complainant is of course free to explain and substantiate his complaint in writing. If desired, the request for a stay can be repeated at the session of June 17, 2020 and the court will decide on that.

Complainant G. Hohmann is hereby summoned to attend the session of the council chamber on 17 June 2020, time 3.00 PM at Court of Appeal in The Hague, Prins Clauslaan 60 in The Hague. The

complainant and his counsel are given the opportunity to explain the complaint at this hearing. Any (further) requests will first be considered at that hearing.

I trust that I have informed you sufficiently.

Yours sincerely,

also on behalf of the chairman, Mr T.E. van der Spoel, and the members of the court,

M.M. Bakker-Otjens

senior secretary