

**Order to refrain against René Düe - Stuttgart Landgericht [District Court]
Decision**

Final Decision in respect of the interim injunction of the Stuttgart LG

Ref. no.

17 O 406/ 00

Pronounced on:

28. 09. 2000

Stuttgart Landgericht
In the Name of the People

Decision
In the proceedings of

Werner Mauss
c/o Attorneys Sedelmeier & Koll
Königstr. 1A
70173 Stuttgart - Claimant -

Attorneys for the action:
Sedelmeier & Koll, Königstr. 1A, 70173 Stuttgart

v e r s u s

René Düe
Hengstway 7
25980 Keitum/Sylt - Defendant -

Attorneys for the action:
Bornemann & Koll, Köbelinger Str. 1, 30159 Hanover

with regard to a duty to refrain

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the 17th Civil Chamber of the

S T U T T G A R T Landgericht
acting through

Presiding Landgericht Judge Richter,
Landgericht Judge Heinrici and
Landgericht Judge Eißler

after the hearing on 14.09.2000
found:

1. The Interim Injunction of 31.07. 2000 is upheld.
2. The Defendant to bear any further costs of these proceedings.

Value of the matter in dispute: 50,000 DM

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Statement of Facts:

Within the framework of temporary relief the Claimant is asserting a claim for injunctive relief against a statement to the press by the Defendant.

Case history: In 1981 the Defendant notified a robbery at his then jeweller's shop, and a loss of more than 13 million DM. The Claimant was appointed by the investigating authorities and the insurance companies and describes himself as a criminal expert. He obtained the Defendant's trust surreptitiously and induced him to hand over pieces of jewellery which had been notified as having been stolen. Judgment was thereupon entered against the Defendant for attempted insurance fraud, amongst other things. He was subsequently acquitted due to a lack of useful evidence.

When the Defendant was in the process - ultimately without success - in 1991/1992 of enforcing his alleged loss with the insurance companies, his name appeared in the newspapers again. A Turkish man accused of murder, called Aydin Y., testified in court in Turkey that he had been instructed by the Defendant to carry out the deed against pay, in order to silence his accomplice. Because the latter had been hired for the "raid" by the Defendant in 1981. Aydin Y. subsequently withdrew his testimony. Based on the press coverage of these events the Claimant's lawyer at the time, Professor Wenzel, filed a complaint against the Defendant with the Celle Generalstaatsanwaltschaft [Chief Public Prosecutor's Office] and the Hanover Staatsanwaltschaft [Public Prosecutor's Office] for suspicion of incitement to murder. The preliminary investigations which followed were suspended approximately one year later in a 7-page Order because, in view of his changing testimony and relevant earlier proceedings, Aydin Y. seemed an unreliable witness.

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The D e case appeared in the press a third time when it was reported in the magazine "Der Spiegel" on 26.06.2000 that almost 11kg of the pieces of jewellery notified as having been stolen at the time had recently been found in the ceiling of the former business premises of the Defendant's father. This article described the entire sequence of events, including the "lead to Turkey". For this reason an interview with the Plaintiff appeared in the "Hannoversche Allgemeine Zeitung" on 29.09.2000 and in the "Wochenspiegel" on 12.07.2000 (Enclosures Ast 6 and Ast 7 to the application). When questioned in this interview, the Claimant stated that the suggestions regarding the alleged murder plot should be followed up. Though he did not know whether the Defendant was indeed capable of giving instructions for murder.

In an article entitled "Mauss wants to harm me" the Defendant was quoted in the "Hannoversche Allgemeine Zeitung" on 06.07.2000 as having made the following statement (subject matter of this action) referring to the murder plot: "I still suspect that the private detective appointed at the time, Mr. Werner Mauss, spread these rumours and now takes them up again in order to harm me" (Encl. 1 to the application, folio 6 of the enclosure).

By means of the opposed Order of 31.07.2000 which threatened an administrative fine, the Claimant procured a prohibition for the Defendant to make and/or spread the allegation, even in form of a suspicion, either verbatim or by implication, "that the Claimant had spread the false rumour that the Defendant had been the instigating participant in a murder plot in Turkey, and had now started this rumour again in order to injure the Defendant." The Defendant has now filed an objection to that Decision. The Plaintiff is of the view that this

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allegation of fact expressed in form of a suspicion is defamatory to him. The statement was untrue because he had not spread rumours about the Defendant regarding a murder plot, neither earlier nor now. Professor Wenzel's complaint at the time had been made on his own initiative. And furthermore there had been good reasons for it, because of the suspicious factors surfacing at the time.

The Claimant pleads
as found.

The Defendant pleads

to set aside the Interim Injunction of 31. 07. 2000

and to dismiss the application.

On the one hand he defends his statement as being true, on the other he pleads justification for his action on the basis of a protection of legitimate interests. He considers that rumours had been spread both by Professor Wenzel's complaint - in the view of the Defendant not to be taken seriously - and also by the Claimant's interview statements. In order to defend himself against these - as he sees it - wrong assumptions, since he had never given any instructions for murder, he considers the statement (the matter in dispute) to be necessary and therefore admissible. Regarding further details of the parties' pleadings and also the question to what extent, from today's point of view, the Defendant is suspected of participating in a fictitious robbery, reference is made to the pleadings of both parties and the enclosures submitted with these.

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Reasons:

I.

The Interim Injunction granted stands. In accordance with sect. 823 paras. 1 and 2, 1004 BGB [Civil Code], in conjunction with sect. 186 StGB [Criminal Code] the Claimant has a right to the Defendant in future desisting from making the statement which is the matter in dispute, because it concerns an untrue and defamatory allegation of fact, which can be repeated at any time. The points of view submitted in the opposition proceedings do not justify a different decision.

1. In the present case stating a suspicion appears as an allegation of fact. It is not, for example, the expression of an opinion, as first brought into the discussion by the Defendant's counsel at the date of the hearing. Characteristically, he himself had

previously (i.e. in the opposition pleading) proceeded from the assumption of a communication of facts which he then defended as being true. The first with justification: The Defendant's quote does not state anything else but that from his point of view the Claimant had - with some probability - spread false rumours about him, only that this could not be proved at the moment. Whether this is fact (that is, whether the Claimant had started rumours about the Defendant - i.e. a specific type of incorrect information - at the beginning of the Nineties and also in recent times), these are circumstances which must be clarified by means of evidence, i.e. facts. Anything else could only apply if the statement appeared - recognizably for the reader - to be a personal conclusion from other facts notified earlier. This is lacking in the present case. The article does not contain anything regarding circumstances from which it could be concluded

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that the Claimant was spreading false rumours about a murder plot. Consequently - even with the indicated restrained interpretation of the statement - the reader does not find out about the Defendant's evaluation of certain events, but about the alleged sequence of events. That these appear in form of a suspicion and are not being presented as certain is then no longer relevant for a classification as communication of facts, but must be considered with regard to the question of the statement's unlawfulness. (See fig. 3 below).

2. The suspicion stated by the Defendant proves to be unjustified from the very beginning. On the basis of the Defendant's submissions in defence of his statement the Court is unable to find that the Claimant had "again taken up" false rumours. It is not apparent in particular that the Claimant had made false statements in the interview which appeared in the "Hannoversche Allgemeine" and the "Wochenspiegel" regarding the relationship between the Defendant and the murder plot. Furthermore - even if no longer relevant for the decision - one cannot proceed from the assumption either that the Claimant had spread false rumours about the Defendant at the beginning of the Nineties.

a) The Claimant's statement during the interview, the likely cause for the Defendant's statement (the matter in dispute), does not constitute spreading false rumours. Even the form of the interview - during which the Claimant had to answer questions put to him - speaks against it, as the initiative for these statements did not come from him. In addition, the Claimant did not spread some vague, unproven information about the Defendant. Above all, he did not claim that the Defendant had given an order for murder.

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On the contrary, he had simply referred to the information already available, that there had been references to a relationship between the Defendant and the murder in Turkey, and expressed what was clearly his own opinion, as to how these references should be dealt with. Expressing such an opinion does not constitute spreading false rumours. At any rate it does not constitute an allegation of fact, that the state of affairs possibly to be concluded from these references were true. To this one must add that the Claimant clearly expressed his reservations in the following paragraph of the interview conducted with him and left it open, whether such a capital offence could be believed of the Defendant at all. Disassociating himself in this

manner makes it clear to the reader once more: the references to a murder plot came neither from the Claimant nor was he involved in passing them on.

b) Neither is it apparent that the Claimant spread false rumours earlier, about the Defendant being involved in the murder in Turkey. Filing a complaint with the competent public prosecutor's offices is not sufficient for that. The Defendant's pleading does not make it clear initially when and how the Claimant made the state of affairs public and had "spread" the alleged rumour. On the contrary, the Defendant merely submits in general terms that the applicant had not only filed a complaint with the Hanover Staatsanwaltschaft but also the Celle Generalstaatsanwaltschaft and had "thereby gone public, whereby it was quite obvious that this was part of a strategy and that by publicizing the filed complaint, public opinion and the current court proceedings were to be influenced" (opposing plea, p. 2, folio 11 of the enclosure). The Staatsanwaltschaft is not the public, though. The Chamber is unable to see why this should be any different with the Celle Generalstaatsanwalt. The Defendant cannot plead either

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that the Claimant had, for example, passed the filing of a complaint to the media and thereby "made it public". What was said by the press departments of the investigating authorities afterwards is another matter and cannot be attributed to the Claimant as his own statement. Furthermore, filing a complaint is something quite different - when intention is considered - from spreading rumours. Persons spreading rumours have first of all and above all the wish to put about a certain information. Someone filing a complaint wishes the public prosecutor to investigate in the interest of the general public. That is a crucial difference which finds and must find expression in the general usage of language. The Defendant, however, did not bear this difference in mind when making his statement. If he merely wanted to say that in the past the Claimant had brought about preliminary investigations because of the murder story, then - in order to be understood correctly - he would have had to say this and not that the Claimant had spread false rumours about him. To this one must add that filing a complaint is a civil right which serves to maintain legal order (see BGH [Federal Court of Justice] NJW 1962, pp. 243, 245). The statements made in the complaint are privileged. Since to that extent it is accepted that persons affected by the complaint must put up with the 'defamation' regularly and unavoidably accompanying it (BGH loc.cit.). If the complainant had to expect to be confronted with claims and counterclaims under civil law by the person against whom the complaint was filed, this right would be restricted unduly. This would only be different if the complaint was lacking any kind of factual basis, as alleged several times on the part of the defence. The murder proceedings in Turkey and corresponding reports in Turkish and German newspapers did, however, in the opinion of the Chamber - and at any rate in view of the important accusation - indeed give cause for an investigation on the part of the public prosecutor's office. If this were not the case, investigations would not have had to be

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carried out for over a year and the reasons leading to the dismissal explained in detail in a 7-page Order.

3. The Defendant is not supported by a justifying interest in the statement. In view of the fact that the Claimant's earlier contributions in the interview - as detailed above - had to be seen (in case of doubt) as an expression of opinion, could not be contested in law and consequently did not constitute a violation of the Defendant's rights, there was no cause for a defence or any counter-measure of the present kind. Nor is the Defendant's statement (the matter in dispute) admissible under the particular prerequisite of a mere statement of suspicion. It has indeed been sufficiently identified as such. There is, however, no privileged reason for spreading unproven, defamatory facts. In view of the frequently remaining stigma which statements of suspicion in the press leave behind, particular reasons must exist, which justify spreading allegations of fact when the situation as to evidence is still unresolved. (Wenzel, Das Recht der Wort- und Bildberichterstattung [Right of Reporting in Word and Pictures], 4th edition, marg.no. 10.135). They might be found in a particular interest of information on the part of the general public, in the fact that further investigations should be instigated, or that certain events are of a particularly risky nature or of particular relevance. To this must be added that there should be at least tangible grounds which speak for the truth of the suspicion uttered (Wenzel loc.cit. marg.no. 10.136). There are no such circumstances in the present case. After the respective investigations against the Defendant had already come to an end in 1993 it seems neither particularly interesting, nor risky, nor pressing whether the Claimant spread false rumours about the Defendant and his links to a possible order for murder then and now. And - as explained above - there are also no sufficient clues that this was really so.

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In view of this state of affairs and in order not to violate the Claimant's civil rights, the Defendant would have had to express himself even more cautiously or wait with a public statement until there was at least the beginning of some evidence for the suspicion entertained by him.

4. The party's extensive pleadings regarding the question of whether the Claimant, in accordance with his interview statement, is correct in his assumption that finding the jewellery now finally convicts the Defendant of a fictitious robbery is not relevant for the Decision, because the Defendant's statement (the matter in dispute) does not refer to the whole complex of the "robbery" but to the alleged murder plot.

II.

The decision as to costs is based on sect. 91 ZPO [Code of Civil Procedure]. A decision as to preliminary enforceability does not apply, because Decisions confirming an Order are in themselves provisionally enforceable.

Presiding LG Judge
 Richter unable to sign (signed) Heinrici (signed) Eißler
 due to absence on holiday LG Judge LG Judge
 (signed) Heinrici
 LG Judge

Stuttgart Landgericht Stamp