T R A N S L A T I O N

The Higher Regional Court Hamburg

Case number: 7 U 86/11

 324 O 102/11

 The Regional Court Hamburg

Judgment delivered on 13.03.2012

Obrecht, court clerk

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Registrar clerk at the Court

**Judgment**

On behalf of the people

In Case

1. **Novolipetsk Steel (NLMK),** 2, pl. Metallurgov, 398040 Lipetsk, Russian Federation

- applicant and respondent -

1. Vladimir **Lisin,** c/o Novolipetsk Steel (NLMK), 2, pl. Metallurgov, 398040 Lipetsk, Russian Federation

- applicant and respondent -

Represented by

Lawyers **Irle**, **Kalckreuth**, Unter den Linden 32-34, 10117 Berlin

v

1. **Handelsblatt GmbH**, represented by the managing director, Kasernenstraße 67, 40213 Düsseldorf

- defendant and appellant -

1. Florian **Willershausen**, c/o Handelsblatt GmbH, Kasernenstraße 67, 40213 Düsseldorf

- defendant and appellant -

Represented by

Lawyers **Damm & Mann**, Ballindamm 1, 20095 Hamburg, Reference number: 00024/11 hn/le

On interim injunction measure

The Higher Regional Court Hamburg – 7th Civil Chamber – composed of

Meyer, judge at the Higher Regional Court,

Dr. Weyhe, judge at the Higher Regional Court and

Lemcke, judge at the Higher Regional Court

based on the oral hearing on 13.03.2012

gives the following

**Judgment**

1. The appeal of the defendant against the judgment of the Regional Court Hamburg of 17.05.2011, Case number 324 O 102/11, is dismissed as long as the second sentence of the prohibition Nr. I b) 2) of the interim injunction of 8.03.2011 will be put in quotation marks.
2. The defendants bear the costs of the appeal.

**Findings of the Court**

 according to Sections 540 paragraph 1 and 2, 313a Code of Civil Procedure

1. The defendants appeal the judgment that confirms the interim injunction of 8.03.2011. The interim injunction prohibited the defendant,
2. to claim and/or to let a third party claim and respectively to disseminate or to let a third party disseminate that,

“Mr. Lisin did not invest any copeck and breached therewith the contract.”

1. regarding the business conduct of the applicant in relation to the purchase of the Maxi-Group to claim and/or to let a third party claim or to disseminate or to let a third party disseminate:
2. “the Russians call this ‘Raiders two’, in German expropriation or plundering: the state or big company groups with good political connections make use of the judiciary, tax and competition authorities, which are mostly corruptible in Russia. Their henchmen pressure the victims with proceedings, raids and dubious additional tax demands until they give up their companies.”
3. “Of course Lisin cannot prove that he controlled the courts, maybe even bribed them. However, there is something seriously amiss, if a company group wins the court case on all issues of the dispute, and the complaints of the smaller partner were not even admitted to the proceedings.”
4. to create the impression, that the managing director appointed by the applicant caused the security case on purpose in order to enable the applicant to acquire control over the plants of the Maxi-Group, through new coverage:

“Maximow claims in contrast that NLMK increased the mountain of debt artificially: Lisin provided Maxi-Group 400 million US Dollar loan for which Maxi-Group’s plants were deposited as security. When the new boss of the group appointed by NLMK did not service the loan, Lisin took the full control.”

The statements that are complained against are part of the article titled “Enterpreneuers loyal to Kremlin are buying off the competitors”, which was published on 16.12.2010 on the website of the defendant 1) [www.wiwo.de](http://www.wiwo.de). The defendant 2) is the author of the article.

Reference is made to the facts of the case established in the judgment of the Regional Court.

By the appeal the defendants raise two pleas in law. First, the defendants allege a procedural breach that the urgency of the matter was not anymore given at the time of the application for an interim injunction on 11.2.2011. According to the defendants the urgency of the matter was not given anymore because the press officer of the applicant 1) was informed by the defendant 2) on 7.12.2011 that the publication was scheduled for the next week and the applicant did not take any actions for eight weeks between the publication date of 16.12.2011 and the beginning of the proceeding for interim injunction.

On substantive grounds the defendants plead that the Regional Court erred in law in awarding the interim injunction on all points.

The defendants allege that the prohibition under number I. a) was imposed wrongly, because the defendants did not adopt the quote as their own. Moreover, the statement is truthful. It is clear from the context that the investments in question were to be made directly after the first transfer of the purchase price installment in January 2008. In January 2008 and until May 2008 the applicant did not invest.

The prohibited statements under number I. b) are considered to be permitted freedom of expression, if interpreted properly. These statements are part of a complex expression that state mostly a subjective opinion rather than assertions of facts. This complex statement cannot be divided into small parts containing facts and banned on their assessment in isolation as false assertion of facts. According to the defendants, the credibility of the facts necessary for the expression of the opinion was established by the affidavit of Nikolai Maximow.

The prohibition of number I. c) is based on false understanding of the text; the text does not create the compelling impression that the new appointed managing director caused the security case on purpose, in order to enable the applicant acquire control over the plants of Maxi-Group. Even in the case of a possible time-related reference of the not serviced loan to the control acquisition, there is an open ambiguity in the meaning of the statement. The applicants could have removed this ambiguity through clarification in the grounds for application.

Moreover, the defendants did not adopt the quoted statements of Nikolai Maximow as their own, which is apparent from the context.

The defendants submit,

 to alter the judgment of the Regional Court of Hamburg of 17.5.2011 (Case number 324 O 102/11),

 to revoke the interim injunction and to reject the application that the injunction is based on.

The applicants submit,

 to reject the appeal.

The applicants defend the judgment of the Regional Court, repeat and extend their submission before the Regional Court. With regard to details of the parties’ submissions this court refers to the written submissions of the parties.

1. The defendants’ appeal is admissible however is not substantiated. The Regional Court did not err in law in confirming the interim injunction.
2. The interim injunction cannot be revoked based on the time period that eliminates the urgency of the matter i.e. between the applicants’ learning of the statements in question and the lodging of the application that initiated the current proceeding. The applicants demonstrated credibly through the affidavits of the CEO of the applicant 1) Alexey Lapshin (Annex applicant 5) and of the press officer of the applicant 1) Evgeny Lukashevich (Annex applicant 8), that the applicants learned about the article in question for the first time on 10.1.2011. Thus, the application for interim injunction has been lodged on 11.2.2011, within less than five weeks.

Even if it could have been shown credibly that the applicant 1) was informed by its press officer on 17.12.2010 that the article is to be published on the following week, contrary to the defendants’ opinion this does not result in a grossly negligent ignorance of the applicants. In this respect, no final decision needs to be taken here, whether the decision of the Higher Regional Court Munich in a competition case referred to by the defendants has to be followed (judgment of 20.12.2010, NJOZ 2002, 1450, 1451). The Higher Regional Court Munich required from an applicant that has gained specific information about the circumstances that suggested a possible violation of the applicant’s rights, to inform itself to prevent the infringement, if it could eliminate the ambiguity without significant costs and effort. In the current case, neither it is evident nor has it been established that the applicants were specifically informed about the circumstances, which suggested there would be a news coverage infringing their rights.

In contrary, the fact that the press officer of the applicant provided the defendant 2) with information and necessary documents suggests the assumption that the applicants trusted in correspondence of the article to the information they provided. Regardless of the specific knowledge of possible infringement of rights, the chamber members do not see any reasons for establishing new requirements within the framework of freedom of speech, such as constant expectation of infringements of rights, on the basis of which an obligation to be informed about the content of a publication, the contrary case of which would justify an assumption of gross negligence.

1. In accordance with the findings of the urgent procedure of interim injunction according to Sections 936, 920 paragraph 2, 294 Code of Civil Procedure the applicants are entitled to the rights granted by the interim injunction on the basis of the ruling of the Regional Court.
2. The Regional Court did not err in law by deciding in the prohibition number a) of the interim injunction that the defendants adopted the quote “Mr. Lisin did not invest any copeck and breached therewith the contract” as their own. Such embracement is usually given in the cases where the statement of another person integrated into own line of thoughts so that that statement appears as own. On the other hand it can be recognized from the appearance of the publication that it merely states a third party statement without own assessment or opinion (BVerfG, NJW 2004, 590, 591). This is for example the case in the publication of a classical interview structured as question and answer (cf. BGH, “Roger Willemsen-Interview”, AfP 2010, 72-75, Rn. 11 with further citations). The piece in the current case is not a classical interview, but rather a report published as an article, which includes direct and indirect quotes. The quote in question has been integrated into the line of thoughts of the article so that it appears to be own statement of the author:

Already the title and subtitle of the article introduce the reader to a critical commentary about the Kremlin loyal company, “…which swallows its competitors with the help of the judiciary and strains therewith the investment climate.” The first paragraph of the body text portrays Nikoai Maximow as a victim of an expropriation, who risks a possible arrest every time he travels to Moscow and therefore lives mostly in England or in Czech Republic. The second paragraph reports that Nikolai Maximow brought the applicant 2) as a partner into his company group and that the applicant 2) managed “…to gain control over the steelworks with fraud and mercy of the judiciary without paying off Maximow.” The author describes in the third paragraph in general similar activities as exerting pressure on victims with the help of mostly corruptible henchmen of judiciary, tax and competition authorities, “…until they give up their companies.” The following paragraphs deal with the cases of Chodorkowski and Lebedew, before in the sixth paragraph the author takes up the statement as his own, that the destiny of the entrepreneur Maximow is the expropriation and repeats the subtitle in the body text. After the depiction of the meeting of the author with Nikolai Maximow in a fast food restaurant and after the description of the dialog partner as positive unpretentious, the author reports his explanations of his motivations to sell more than 50 percent of the shares. In the following paragraph the author reports– without referring to the explanations of his dialog partner – about the essentialia of the agreement. Only after the portrayal of the payments made in January 2008 the author gives the quote: “Mr. Lisin did not invest any copeck and breached therewith the contract” as a reason for fact that soon after Nikolai Maximow withdrew 250 million dollar from the company. Within the overall context of the article this appears to be therefore as a single aspect of previously denounced swallowing of competitors, which is specified by the example of Nikolai Maximow. Therefore, under consideration of the connection, it follows for a recipient that the author adopted the quote in question as his own.

From the point of view of an interested average recipient the objective message of the quote can be interpreted in various ways. The quote is explicitly given as a reason for Nikolai Maximow’s withdrawal of 250 million USD shortly after the allocation from the company. If this however, occurred – as claimed – because the applicant did not invest anything into Maxi Group, then the statement about failed investment referred to the time period until the withdrawal of 250 million USD by Maximow (end of January or beginning of February 2008).

When exactly the period started, when the applicant supposedly “…did not invest any copeck”…is not communicated in the article explicitly.

One possible interpretation insofar is that the applicant allegedly did not invest anything after the conclusion of the agreement with Nikolai Maximow and until the withdrawal of 250 million USD by Maximow. This interpretation can be supported by the second half of the quote according to which the applicant 2) “…therewith breached the contract.” The recipients are not informed when exactly the contract was concluded; the article names only November 2007 as the time, when “…the disaster took its course…”.

Another plausible interpretation due to the drastic wording “any copeck” as well as the missing time period for the failed investment is that the applicant did not invest anything into Maxi Group not only since the conclusion of the agreement, but also within the whole period since November 2007 until the repayment of 250 million USD invested by Nikolai Maximow. According to this version of the interpretation it is still possible that Nikolai Maximow, who is presented as a victim of expropriation by the author, would accuse the defendant of breach of contract because he did not invest anything. This interpretation is further supported by the fact that the article does not mention any other investments made by the applicant into Maxi Group except for the quote in question. With regard to the loan by the applicant mentioned in the end of the of the paragraph, the recipient does not learn when exactly the loan was granted to the Maxi Group, so that this could have also occurred later than end of January or beginning of February 2008.

This last most likely version of the interpretation is false; it is undisputable that the applicant 1) granted a loan of 9,7 billion RUB to the Maxi Group in December 2007. The article does not differentiate between the applicant 1) and applicant 2).

In accordance with the principles of the Federal Constitutional Court applied to assessment of ambiguous statements (Decision of 25.10.2005, AfP 2006, 41 et seq. paragraph 39) in case of prohibitory injunction claims the version, which infringes the personality rights the most, has to be taken as a basis.

As the defendants did not eliminate the risk of re-offending indicated by the publication, the prohibitory injunction claim number a) of the interim injunction is substantiated.

1. The Regional Court did not err in law in accepting the application for interim injunction number b). In order to avoid unnecessary repetition this chamber refers to the reasoning of the judgment under appeal, which this chamber adopts as its own. With regard to the statements of the appeal the following has to be complemented:

Within the context of the publication and the interconnection of the statements in question under number b) 1) and 2), these statements entail in essence a concrete message or at least a corresponding assumption that the applicant NLMK made use of corruptible judiciary and/or courts in Russian for its acquisition of the Maxi Group; that the applicant Lisin controlled the courts or bribed them and the applicants exerted therewith a strong pressure on Nikolai Maximow that he had to give up his company. In the current case, this statement differs from the interview statement at the core of the case of Federal Court quoted by defendant (NJW 2009, 3580). The statement at issue is not without a substance, so that no concrete tangible fact could be extracted as it was the case in the Federal Court’s decision of the quote “…the business activities were not always appropriate”. On the contrary the publication at issue, which is published on internet of a publishing house, reports complementarily, that the agreement parties dragged each other to the court and that the applicant has won every case until now. This declarative statement of the author corresponds to the quote: “However, there is something seriously amiss, if a company group wins the court case on all issues of the dispute, and the complaints of the smaller partner were not even admitted to the proceedings.” Furthermore, the article describes the foreclosure sale of the plants and quotes in this context the subjective statement of Nikolai Maximow’s lawyer: “the auction seems to be fictitious…”. Moreover, the reader learns that the applicant enforced in court the freezing of Maximow’s shares of 250 million USD.

The supplementation of quotation marks before and after the quote in number b) 2) is based on the corrected application of the applicants.

1. The Regional Court also did not err in law in confirming the prohibition number c) of the interim injunction. The court assumed rightly that the defendants adopted as their own the text passage that communicates this impression. In addition, this chamber refers to the reasoning above under II. 2. a).

This chamber is also of the opinion that the statement creates this compelling impression under prohibition. Contrary to the opinion of the defendants, it is not possible to assume a mere time-related reference between the failed repayment of the loan and the acquisition of control. This interpretation cannot be reconciled with the context of the text passage and the overall content of the article. In the contrary, it is strongly implied that the fraud of the applicant mentioned in the second paragraph was directed to gain control over the steelworks. This fraud consisted in providing, according to Maximow, an artificially increased loan of 400 million USD, which however was not serviced by the new boss of the Maxi Group appointed by the applicant with the purpose of causing the security case and of realizing the mortgage loan, in order to get to the plants that were encumbered with a mortgage.

This chamber refers for the rest to the accurate reasoning of the Regional Court.

The decision on the costs is based on Section 97 paragraph 1 Code of Civil Procedure. The addition of the quotation marks to the prohibition number I. b) 2) of the interim injunction has no effect on the decision on the costs (Section 938 paragraph 1 Code of Civil Procedure).

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| Meyer | Dr. Weyhe | Lemcke |
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| Judge at the Higher Regional Court | Judgeat the Higher Regional Court | Judgeat the Higher Regional Court |