

**National Jurisprudence number: AN7253 Case no.: C02/186HR**

Source: Supreme Court of the Netherlands The Hague

Date of court order: 19-12-2003

Date of issue: 19-12-2003

Type of case: civil - civil miscellaneous

Type of proceedings: cassation

19 December 2003

First Chamber

Nr. C02/186HR

JMH/AT

Supreme Court of the Netherlands

Decree

in the case of:

1. VERENIGING BUMA,
2. STICHTING STEMRA,

both established in Amstelveen,

PLAINTIFFS in the cassation proceedings, defendants in the review-appeal proceedings,

attorney: mr. T. Cohen Jehoram,

v e r s u s

KAZAA B.V., established in Amsterdam,

DEFENDANT in the cassation proceedings, plaintiff in the review-appeal proceedings,

attorneys: mrs. W.E. Pors and C.B. Schutte.

1. The legal proceedings in the factual instances

The defendant in the cassation proceedings – hereinafter called: KaZaA – summoned the plaintiffs in the cassation proceedings – hereinafter jointly called: Buma/Stemra – in summary proceedings through a writ of 9 November 2001 before the President of the Court in Amsterdam, and claimed through a court order, to the greatest possible extent provisionally enforceable and through an original:

1. within two days following the moment the court order to be issued in this matter has been served, to order Buma/Stemra to continue the negotiations with KaZaA pursuant to the previously held talks and negotiations, in accordance with fairness and reasonableness, in order to effect the intended licence agreement, at the penalty of NLG 50,000.- per day or each part of the day that Buma/Stemra should fail to comply with this order, or to impose a provision to be decided by the President through proper administration of justice, and,
2. to severally order Buma/Stemra to pay the costs in these proceedings, including all the costs of the execution of the court order.

Buma/Stemra contested the claim and claimed in the defendant's claim procedure, through a court order provisionally enforceable:

within 14 days following the moment the court order to be issued in this matter has been served, to order KaZaA to take measures to such extent, that no longer infringing publications and reproductions of musical works can be made through the computer programme provided by them, on copy rights with regard to musical works that are part

of the Buma and Stemra repertories, while KaZaA is to forfeit a penalty payable to Buma/Stemra on demand of NLG 100,000.- for each day or part of a day that KaZaA should fail to comply with the order to be imposed.

KaZaA contested the claim in the defendant's claim procedure.

In a court order of 29 November 2001, the President sustained the claims both in the plaintiff's claim procedure and in the defendant's claim procedure, although the claimed penalties were moderated and maximised.

KaZaA appealed to this court order issued in the defendant's claim procedure with the Court of Appeal in Amsterdam. Buma/Stemra appealed to the court order issued in the plaintiff's claim procedure for a review of the Court of Appeal's decision.

In the decree of 28 March 2002, the Court of Appeal annulled the court order issued by the President both in the main-appeal case and in the review-appeal case in the plaintiff's and in the defendant's claim procedures, and once again decided on the case and still dismissed Buma/Stemra's claim in the defendant's claim procedure in the main-appeal case and KaZaA's claim in the plaintiff's claim procedure in the review-appeal case. The decree of the Court of Appeal is attached to this decree.

## 2. The legal proceedings in cassation

Buma/Stemra appealed in cassation to the Court of Appeal's decree. KaZaA appealed in cassation for a review of the Court of Appeal's decision. The writ of summons in the cassation proceedings and the statement of defence, also containing the review appeal are attached to this decree and constitute part thereof.

KaZaA applied for the dismissal of the main-appeal case and Buma/Stemra applied for reference to the Court of Appeal's decision in the review-appeal case.

Explanatory notes on the case were provided by the parties' attorneys and for Buma/Stemra also by mr. K.A. van Voorst, attorney with the Supreme Court.

The statement of Attorney-General D.W.F. Verkade includes dismissal in the main-appeal case and annulment of the decree in the review-appeal case, while the case is to be referred to a contiguous Court of Appeal.

Buma/Stemra's attorney responded to this statement in his letter of 17 October 2003.

## 3. Basic principles in cassation

3.1 Cassation is to be based on the facts mentioned in the Attorney-General's statement in 2.1.

3.2 Summarising, KaZaA claimed in the summary proceedings at issue that Buma/Stemra be ordered to continue negotiations with KaZaA in order to effect the intended licence agreement.

Buma/Stemra claimed in the defendant's claim procedure to order KaZaA to take measures to such extent that no longer infringing publications and reproductions of musical works can be made through the computer programme provided by them, on copy rights with regard to musical works that are part of the Buma and Stemra repertories.

The President sustained both the claim in the plaintiff's and in the defendant's claim procedures, providing that he also moderated and maximised the claimed penalties.

The Court of Appeal annulled the President's court order both in the plaintiff's and in the defendant's claim procedures, and dismissed the claims of Buma/Stemra and those of KaZaA.

## 4. Assessment of the Challenge of the Court Decision in the Main-appeal case

4.1 The complaint in Part I.2 includes that the Court of Appeal based itself on an incorrect and incomprehensible explanation of the Buma/Stemra claims in the grounds 4.5-4.8. According to the complaint, the Court of Appeal has apparently interpreted the

claim in the way that the (only) claim made was that KaZaA was to prevent in the future that music files be exchanged *by means of the software already distributed by KaZaA in the past*, whereas this restriction cannot be found in the Buma/Stemra claim or the consecutive explanation, and has not been read this way by KaZaA.

The complaint is based on an incorrect reading of the decree issued by the Court of Appeal and can therefore, because of a lack of a factual basis, not result in an annulment, since the decree does on the one hand not contain any indications – and neither does the complaint mention such indications for that matter – implicitly stating that the Court of Appeal restricted itself to the computer programme provided in the past, whereas on the other hand it does follow from its assessments that it did implicitly refer to future software. *Inter alia* the passages from the report by Prof. Huizer that are reproduced in ground 4.4 of its decree do show this, which passages the Court of Appeal apparently endorses. In this report *inter alia* the question is discussed whether it is possible to adapt KaZaA, apparently referring to the programme named, in such way that it will recognise files bearing copyrights and will subsequently refuse to communicate these files. Also ground 4.7 shows this, in which the Court of Appeal discusses Buma/Stemra's argument that the new owner of KaZaA is able to check the use of its programme.

4.2 Part I.3 accuses the Court of Appeal of the fact that, if it was of the opinion that the order claimed was too broad and/or too far reaching, it should at least have allocated a less far-reaching provision, *i.e.* that KaZaA would no longer provide and distribute a computer programme by means of which publications and multiplications of musical works can take place infringing the copyrights of the Buma/Stemra repertory. Apparently and not incomprehensibly, the Court of Appeal did not consider the defined provision, which means that the provision and distribution of the programme in question is not in any way permitted, as a less far-reaching provision than an order to change the programme. This decree did not need any further substantiation. This means that the complaint was proposed in vain.

4.3 Part I.4 repeats the complaint of part I.3 with respect to another provision that the Court of Appeal had had to investigate and that the complaint indicated as less far-reaching. If it were impossible for KaZaA to take the measures claimed by Buma/Stemra, it was, according to the complaint, in any case possible for KaZaA to redesign its programme, in such way that no more infringing publications and multiplications could take place, and to try to convince its users that they would have to install this new version.

The complaint fails. In ground 4.8, the Court of Appeal apparently ruled that adaptations were possible not only with respect to the existing programme but also with respect to a new programme, but not such that no infringing publications and multiplications of the copyrights regarding the musical works being part of the Buma/Stemra repertory could take place at all. Particularly in view of the report by Prof. Huizer represented by the Court of Appeal, this decision is not incomprehensible. Also taking into account that this concerns summary proceedings, the court did not need to substantiate this ruling any further.

4.4 In ground 4.6, second dash, the Court of Appeal discusses exhibit 2s, which it defines as an e-mail of 26 July 2001 from KaZaA's attorney to Buma/Stemra. The complaint in Part I.5 includes that the Court of Appeal disregarded the fact that exhibit 2s to which Buma/Stemra had referred in its particulars of the statement of claim in the defendant's claim procedure, was its own exhibit 2s, which definitely does mention KaZaA's commitment to fight "possible infringements". The complaint in itself is well-founded, but it cannot lead to reversal of the judgment due to lack of interest, as it does not imply that and why the Court of Appeal should have come to another judgment if it had taken exhibit 2s of Buma/Stemra into consideration.

4.5 As the decision of the Court of Appeal can be sustained independently by the grounds

of the Court of Appeal that were challenged in vain pursuant to the abovementioned observations in 4.1 – 4.4, parts II and III need not be discussed.

#### 5. Assessment of the legal remedy in the review-appeal case

The Court of Appeal has ordered KaZaA to pay the costs of the proceedings in the plaintiff's claim procedure and the costs of the review-appeal case. The Court of Appeal has founded this decision on the fact that during the court session KaZaA withdrew its claim for further negotiations and that this implies that the ground in the review-appeal case, directed against the order given to Buma/Stemra in the plaintiff's claim procedure to continue the negotiations with KaZaA, was successful and that the judgment, to the extent it was issued in the plaintiff's claim procedure, had to be annulled (ground 4.11). In the above assessment, the Court of Appeal has failed to appreciate that KaZaA's withdrawal of its claim does not necessarily mean that the court in the first instance was wrong to allow this claim and the Court of Appeal has wrongly held that the ground of Buma/Stemra against that decree was founded on this point. The Court of Appeal was therefore wrong to order KaZaA to pay the costs of the proceedings in the first instance and in appeal, so that the complaint can be sustained.

#### 6. Decision

The Supreme Court:

in the main-appeal case:

dismisses the appeal;

orders Buma/Stemra to pay the costs of the proceedings in cassation, up to this decision estimated at € 301.34 for disbursements and € 1,365.- for salary on the part of KaZaA;

in the review-appeal case:

annuls the decree of the Court of Appeal in Amsterdam of 28 March 2002;

refers the legal proceedings to the Court of Appeal in The Hague for a further trial of and decision on the case by the said Court;

orders Buma/Stemra to pay the costs for the proceedings in cassation, up to this decision estimated at € 68.07 for disbursements and € 1,590.- for salary on the part of KaZaA.

This decree has been issued by Vice President P. Neleman as chairman and legal councillors H.A.M. Aaftink, A.M.J. van Buchem-Spapens, P.C. Kop and E.J. Numann, and was pronounced in public by legal councillor F.B. Bakels on 19 December 2003.