20 January 2017

First Chamber

15/02186

LZ/AS

The Supreme Court of the Netherlands

Ruling

in the case of:

EUROPEAN PATENT ORGANISATION,
based in Munich, Germany, as well as Rijswijk,

APPELLANT in cassation,

lawyer: *mr*. G.R. den Dekker,

a n d

the STATE OF THE NETHERLANDS (Ministry of Foreign Affairs),
with its seat in The Hague,

intervener on the side of the APPELLANT in cassation,

lawyer: *mr*. K. Teuben,

a g a i n s t

1. VAKBONDSUNIE VAN HET EUROPEES OCTROOIBUREAU [Trade Union of the European Patent Office] (VEOB, The Hague division),

with its seat in Rijswijk,

2. SUEPO (Staff Union of the European Patent Office),

with its seat in THE HAGUE,

DEFENDANT in cassation,

lawyers: Messrs R.S. Meijer and A. Knigge.

The Parties shall hereinafter be referred to as EPOrg and VEOB et al. and the intervener as the State.

1 The action

For the course of the action so far the Supreme Court refers to its ruling of 11 September 2015, ECLI:NL:HR:2015:2534, DUTCH LAW REPORTS 2015/369. In that ruling the Supreme Court allowed the State to join in on the side of the EPOrg and referred the case to the cause list for the continuation of the action.

The ruling in the procedural issue is appended to this ruling.

2 The further course of the proceedings

The case was explained orally and in writing for the parties by their lawyers, including for the State by *mr*. G.C. Nieuwland.

The opinion of the Advocate General P. Vlas is to set aside the contested ruling and to place it at the disposal of the Supreme Court as referred to in 2.20 of that opinion.

The lawyers for the Parties have each responded to that opinion by letter dated 14 October 2016.

3 Assumptions in cassation

3.1

The following can be assumed in cassation.

(i) EPOrg is a legal entity established under international public law, which was founded in 1973 under the European Patent Convention (Treaty Series 1975, 108, and 1976, 101; hereinafter referred to as: EPC). The EPC entered into force in the Netherlands on 7 October 1977. The EPOrg has 38 participating Member States ('Contracting States') and has its seat in Munich. One of the organs of the EPOrg, the European Patent Office, is based in Munich and has a branch in Rijswijk.

(ii) Article 4 of the EPC states the following:

"1. A European Patent Organisation, hereinafter referred to as the Organisation, is established by this Convention. It shall have administrative and financial autonomy.

2. The organs of the Organisation shall be:

a. the European Patent Office;

b. the Administrative Council.

3. The task of the Organisation shall be to grant European patents. This shall be carried out by the European Patent Office supervised by the Administrative Council."

(iii) Article 8 of the EPC states the following with regard to privileges and immunities:

"The Protocol on Privileges and Immunities annexed to this Convention shall define the conditions under which the Organisation, the members of the Administrative Council, the employees of the European Patent Office, and such other persons specified in that Protocol as take part in the work of the Organisation, shall enjoy, in each Contracting State, the privileges and immunities necessary for the performance of their duties."

(iv) Article 13 of the EPC relates to disputes between the EPOrg and the employees of the European Patent Office and reads as follows:

"1. Employees and former employees of the European Patent Office or their successors in title may apply to the Administrative Tribunal of the International Labour Organisation in the case of disputes with the European Patent Organisation, in accordance with the Statute of the Tribunal and within the limits and subject to the conditions laid down in the Service Regulations or the Pension Scheme Regulations or arising from the conditions of employment of other employees.

2. An appeal shall only be admissible if the person concerned has exhausted such other means of appeal as are available to him under the Service Regulations, the Pension Scheme Regulations or the conditions of employment of other employees."

(v) Article 3 of the Protocol belonging to the EPC concerning privileges and immunities of the EPOrg (Protocol on Privileges and Immunities; hereinafter referred to as: PPI) reads as follows:

"1. Within the scope of its official activities the Organisation shall have immunity from jurisdiction and execution, except:

a) to the extent that the Organisation shall have expressly waived such immunity in a particular case;

b) in the case of a civil action brought by a third party for damage resulting from an accident caused by a motor vehicle belonging to, or operated on behalf of, the Organisation, or in respect of a motor traffic offence involving such a vehicle;

c) in respect of the enforcement of an arbitration award made under Article 23.

2. The property and assets of the Organisation, wherever situated, shall be immune from any form of requisition, confiscation, expropriation and sequestration.

3. The property and assets of the Organisation shall also be immune from any form of administrative or provisional judicial constraint, except in so far as may be temporarily necessary in connection with the prevention of, and investigation into, accidents involving motor vehicles belonging to or operated on behalf of the Organisation.

4. The official activities of the Organisation shall, for the purposes of this Protocol, be such as are strictly necessary for its administrative and technical operation, as set out in the Convention."

(vi) VEOB is a trade union of the European Patent Office. VEOB is an association established under Dutch law and has its seat in Rijswijk. Membership of VEOB is open to those persons who are or have been employed by the European Patent Office at the Rijswijk office.

(vii) SUEPO is an umbrella union for the staff of the EPOrg and has four branches: The Hague (VEOB), Munich, Berlin and Vienna.

(viii) On behalf of its members VEOB et al. declared strikes from March 2013 onwards. The members actually went on strike in March, May, June and July 2013.

(ix) The EPOrg staff conditions of employment are set out in the 'Service Regulations for Permanent Employees' (hereinafter referred to as: the Service Regulations). The Service Regulations incorporate a special procedure for resolving disputes between EPOrg and (former) employees of EPOrg. An employee of EPOrg that disagrees with a decision taken against him/her can challenge the decision on the basis of the Service Regulations by means of an internal appeal procedure. This internal appeal procedure means that an objection can be lodged with the

President of the EPOrg against a decision that has been made. If the President does not allow the objection the case is then brought before the Internal Appeals Committee, which Committee provides advice to the President. On the basis of this advice the President then decides whether the objection can still be allowed. The decision of the President can be appealed via the International Labour Organisation Administrative Tribunal in Geneva (hereinafter referred to as: ILOAT) on the grounds of Article 13 of the EPC.

(x) With effect from 1 July 2013 the EPOrg supplemented the Service Regulations with provisions concerning strikes, because this included a new Article 30a and a new Article 65 paragraph 1 sub c which, insofar as important, read as follows:

"Article 30a (...)

Right to strike

(1) All employees have the right to strike.

(2) A strike is defined as a collective and concerted work stoppage for a limited duration related to the conditions of employment.

(3) A Staff Committee, an association of employees or a group of employees may call for a strike.

(4) The decision to start a strike shall be the result of a vote by the employees.

(5) A strike shall be notified in advance to the President of the Office. The prior notice shall at least specify the grounds for having resort to the strike as well as the scope, beginning and duration of the strike.

(...)

(8) Strike participation shall lead to a deduction of remuneration.

(9) The President of the Office may take any appropriate measures, including requisitioning of employees, to guarantee the minimum functioning of the Office as well as the security of the Office's employees and property.

(10) The President of the Office may lay down further terms and conditions for the application of this Article to all employees; these shall cover inter alia the maximum strike duration and the voting process.

(...)

Article 65 (..)

Payment of remuneration

(1) (…)

(a) Payment of remuneration to employees shall be made at the end of each month for which it is due.

(...)

(c) (...) the monthly amount shall be divided into twentieths to establish the due deduction for each day of strike on a working day."

(xi) The new rules are further elaborated in a 'Circular on Strikes' (Circular 347) issued by the President of the EPOrg.

(xii) VEOB et al. adopt the position that by implementing the new rules in the Service Regulations the EPOrg excessively limits the Right to Strike and obstructs the work of the union, and that the EPOrg has wrongfully excluded them from the collective negotiations.

3.2.1

In the preliminary relief proceedings in question, VEOB et al. claimed, insofar as is important in cassation, that EPOrg should be ordered– in any event as regards the staff working at the Rijswijk office – (i) to end the breaches of the right to strike and of the right to collective negotiations as well as the breaches of the right to freedom of association and peaceful assembly and the breaches of due social care, (ii) to suspend the operation of Articles 30a and 65 paragraph 1 sub c of the Service Regulations, (iii) to acknowledge VEOB et al. as social partners with the right to collective negotiations (including strike), or at least order EPOrg to admit VEOB et al. to collective negotiations; and furthermore (iv) prohibit EPOrg from conducting discussions about or continuing new collective agreements without admission of VEOB et al.

EPOrg has primarily relied on its jurisdiction immunity by virtue of Article 3 of the PPI.

3.2.2

The court in preliminary relief proceedings disallowed EPOrg's invoking of jurisdiction immunity, and rejected the claims of VEOB et al.

3.2.3

The Court of Appeal set aside the judgement of the court in preliminary relief proceedings. In the Court of Appeal's opinion, EPOrg has no right to invoke jurisdiction immunity. The Court of Appeal (i) ordered EPOrg to provide VEOB et al. with unhindered access to EPOrg's e-mail system, (ii) prohibited EPOrg from applying Article 30a paragraphs 2 and 10 of the Service Regulations, and (iii) ordered EPOrg to admit VEOB et al. to the collective negotiations. To that end, the Court of Appeal considered as follows.

In this case the protection of the rights guaranteed by the ECHR (European Convention on Human Rights) is "manifestly deficient". The lack of a judicial process for VEOB et al. with ILOAT or any other judicial process made accessible by EPOrg means a breach of Article 13 of the ECHR if the Dutch Court was not to offer VEOB et al. any judicial process for their claims based on Article 11 of the ECHR (ground for the decision 3.7). The possibility of individual employees of EPOrg to be able to challenge restrictions to their right to strike with EPOrg and with ILOAT cannot be considered an effective means of enforcing the right of collective action or collective negotiation as guaranteed by Article 11 of the ECHR (ground for the decision 3.8). EPOrg itself could have opted to establish a judicial process embodying sufficient guarantees (ground for the decision 3.9). Also, considering the associated circumstances, EPOrg invoking its immunity is disproportionate. The Dutch Court therefore has jurisdiction to examine the claims of VEOB et al. (ground for the decision 3.10)

With regard to the claims of VEOB et al. the jurisdiction of the Dutch Court is assumed (ground for the decision 4.5). Furthermore, the claims of VEOB et al. to be acknowledged and admitted as a negotiating partner have an urgent character (ground for the decision 4.7).

The measures relating to the internal communication channels imposed by EPOrg are disproportionate (ground for the decision 5.2-5.3). Article 30a paragraph 2 and paragraph 5 of the Service Regulations wrongly make it impossible to strike where the duration is unknown or not notified in advance (ground for the decision 5.7). Also, the limiting of the right to strike to 'work stoppage', which excludes an alternative collective action a priori, is wrong, as is the condition that the collective actions must relate to employment conditions (ground for the decision 5.8-5.9).

EPOrg must admit VEOB et al. to collective negotiations, however, the claim by VEOB et al. that they must be acknowledged by EPOrg as social partners is not allowable due to a lack of significance. Because this concerns preliminary relief proceedings it is also inappropriate to compel EPOrg to accept an acknowledgement to which it objects (ground for the decision 5.14)

3.3

The plea primarily complains that the Court of Appeal has incorrectly dismissed EPOrg's reliance on its jurisdiction immunity and, amongst other things, pleas the following.

The possibility of the members of VEOB et al. to use the internal judicial process at EPOrg and at ILOAT to object against measures taken against them, as well as against the decisions on which the measures are based, is a reasonable alternative means in order to effectively protect the (primary) rights arising for them in Article 11 paragraph 1 of the ECHR.

The Court of Appeal has also failed to appreciate that the EPOrg staff representatives can apply to ILOAT to defend the interests of all staff. That possibility is also a reasonable alternative means of effectively protecting the rights invoked on the grounds of Article 11 paragraph 1 of the ECHR.

Considering the existence of these reasonable alternative means for the effective protection of the rights referred to by VEOB et al., the Court of Appeal has incorrectly come to the conclusion that (i) the protection of the fundamental rights is "manifestly deficient" at EPOrg, (ii) if, in this case, the Dutch Court was not to provide any judicial process for VEOB et al., the right to an effective means of recourse guaranteed by Article 13 of the ECHR will be breached and (iii) the granting of the immunity on which EPOrg relies, is disproportionate because of a lack of a reasonable alternative judicial process for VEOB et al.

4 Preliminary considerations

4.1

According to settled case law of the European Court of Human Rights the right of access to the court contained in Article 6 of the ECHR is not absolute. When determining the scope of that right the states that are part of the Convention have a certain degree of discretion, albeit that the ultimate judgement regarding compliance with the requirements set by the ECHR rests with the European Court of Human Rights. A restriction in the right of access to the court by a person seeking justice is not permissible if, as a consequence, the essence of that right is affected. Nor is a restriction compatible with Article 6 of the ECHR if it serves no legitimate purpose or if it is disproportionate to the associated aim that is pursued. (Cf. European Court of Human Rights 28 May 1985, No. 8225/78, Ashingdane, ground for the decision 57; European Court of Human Rights 18 February 1999, No. 26083/94, Waite & Kennedy/Germany, ground for the decision 59)

4.2

The granting of privileges and immunities to international organisations represents a restriction in the right of access to the court in the sense of Article 6 of the ECHR. According to settled case law of the European Court of Human Rights this serves a legitimate purpose. The (long-existing) custom that states generally grant the organisation jurisdiction immunity and immunity from enforcement in the deed of incorporation for an international organisation or in a supplementary agreement is, according to the European Court of Human Rights, necessary for the proper operation of that organisation, without unilateral interference of individual states (cf. Waite & Kennedy/Germany, ground for the decision 63; European Court of Human Rights 11 June 2013, no. 65542/12, Dutch Law Reports 2014/263, Stichting Mothers of Srebrenica/Nederland, ground for the decision 139)

4.3

To answer the question as to whether the granting of jurisdiction immunity to an international organisation is proportional, it is particularly important whether the person seeking justice has reasonable alternative means in order to effectively protect the rights granted to that person by the ECHR (cf. Waite & Kennedy/Germany, ground for the decision 68; European Court of Human Rights 29 January 2015, No. 415/07, Klausecker, ground for the decision 69; also see Supreme Court 18 December 2015, ECLI:NL:HR:2015:3609, Dutch Law Reports 2016/264). If reasonable alternative means are available for a person seeking justice then it can be assumed that the granting of jurisdiction immunity does not affect the essence of that person's right to access the court.

4.4

The European Court of Human Rights has also considered, with regard to the test of proportionality as referred to above in 4.3: "the test of proportionality cannot be applied in such a way as to compel an international organisation to submit itself to national litigation in relation to employment conditions prescribed under national labour law". An interpretation of Article 6 of the ECHR and the

right of access to the court which means that national legislation would be applicable would in such cases hinder the proper operation of international organisations and be at odds with the trend of expansion and strengthening of international collaboration (cf. Waite & Kennedy/Germany, ground for the decision 72)

4.5

Finally, it is important that according to the European Court of Human Rights a civil-law legal action cannot set aside the reliance on jurisdiction immunity on the simple ground that that legal action is based on an exceptionally serious breach of an international law norm, or even a peremptory norm (cf. Stichting Mothers of Srebrenica/Nederland, ground for the decision 158).

5 Assessment of the means of recourse

5.1

As is evident from the consideration above in 4.1-4.5, in ground for the decision 3.6 the Court of Appeal has put the correct norm first and foremost, where it has considered that reliance on immunity of an international organisation should be rejected if the essence of a person's right to access the court as referred to in Article 6 of the ECHR is affected or the protection of the fundamental rights by the relevant organisation is manifestly deficient.

5.2

In the subsequent grounds for the decision the Court of Appeal has come to the opinion that the protection of the rights guaranteed by the ECHR is manifestly deficient within EPOrg and that EPOrg reliance on the jurisdiction immunity it has been granted is disproportionate, so that the Dutch court has jurisdiction to examine the claims of VEOB et al. (ground for the decision 3.7-3.10). This opinion is justified by the Court of Appeal as follows:

(i) Because VEOB et al. are unable to commence an action with ILOAT, nor via any other judicial process made accessible by EPOrg for their claims (which are based on the right of collective action and the right of collective negotiations contained in Article 11 of the ECHR, Article 6 of the ESC and ILO Conventions 87 and 98) the right to an effective means of recourse for a national organisation guaranteed by Article 13 of the ECHR will be breached if the Dutch court was not to offer VEOB et al. any opportunity to commence an action (ground for the decision 3.7).

(ii) It would be in conflict with the collective nature of the collective rights in the action if only individual employees were able to subsequently challenge the impairment of these rights. The fact that individual employees can challenge restrictions in their right to strike with EPOrg and subsequently with ILOAT, particularly the measures that may be taken against them due to a breach of the strike rules, cannot be considered as an effective means of recourse for enforcing the relevant collective rights. And it is much less possible to see how the judicial process for an individual employee would allow the right to collective negotiations to be brought up for discussion at ILOAT, or what other judicial process VEOB et al. would be able to use for that purpose (ground for the decision 3.8).

(iii) Although the lack of an alternative judicial process does not in itself create a breach of Article 6 of the ECHR, that is indeed the case in this question considering the following additional

circumstances: (a) the rights of the unions to take collective action and conduct collective negotiations are rights which belong to the fundamental principles of an open and democratic state based on the rule of law and which have found recognition in multiple conventions, (b) the arguments put forward by VEOB et al. mean that the rights are being breached systematically and in a far-reaching way by EPOrg because the right to strike is being restricted in an unacceptable way and VEOB et al. are completely being denied the right to participate in collective negotiations, although they are adequately representative, and (c) the arguments put forward above under (b) are not prima facie unfounded (ground for the decision 3.10).

5.3

The primary grievance of the means of recourse as set out above in 3.3, which is aimed against the ruling of the Court of Appeal as set out above in 5.2, finds its mark.

5.4

The claims from VEOB et al. are based on the freedom to form trade unions as referred to in Article 11 paragraph 1 of the ECHR. The dispute focuses on the question as to whether the applicable proportionality requirement within the framework of Article 6 of the ECHR has been met, in the sense that there are reasonable alternative means that allow the rights of VEOB et al. under Article 11 paragraph 1 of the ECHR to be effectively protected, because (not VEOB et al. themselves, but) the members of VEOB et al. are able to use the judicial processes made accessible by EPOrg to protect the rights intended to be protected in Article 11 paragraph 1 of the ECHR. That question should be answered in the affirmative on the basis of the following.

5.5

As far as the freedom to form trade unions that is guaranteed in Article 11 paragraph 1 of the ECHR is concerned, the settled case law of the European Court of Human Rights is that convention states are obliged to ensure that trade unions are able to endeavour to protect the interests of their members, and that the individual members have the right, for the purpose of protecting their interests, for the unions to be consulted by employers (see for example European Court of Human Rights 2 July 2002, Nos. 30668/96, 30671/96 and 30678/96, Wilson, ground for the decision 44; European Court of Human Rights 12 November 2008, No. 34503/97, Demir and Baykara, ground for the decision 143). However, according to the European Court of Human Rights, Article 11 paragraph 1 of the ECHR does not guarantee specific treatment for trade unions or members of trade unions. A restriction in the freedom to form a trade union does not represent a breach of Article 11 paragraph 1 of the ECHR if alternatives are available to represent the interests that are the subject of this action (cf. European Court of Human Rights 27 October 1975, No. 4464/70, National Union of Belgian Police, ground for the decision 40; European Court of Human Rights 17 July 2007, Nos. 74611/01, 26876/02 and 27628/02, Dilek et al., ground for the decision 72).

5.6

From European Court of Human Rights case law (in particular, see European Court of Human Rights 2 October 2014, No. 32191/09, ADEFDROMIL, ground for the decision 58-60) it cannot be simply derived that the freedom to form a trade union as referred to in Article 11 paragraph 1 of the ECHR also includes a right for the union to access the court. Neither the ESC, nor ILO Conventions 87 and 98 imply a right of access to the court by trade unions. Insofar as VEOB et al. have to be followed in their argument that trade unions have that right on the basis that the collective rights

which also arise for them from Article 11 paragraph 1 of the ECHR, otherwise cannot be effectively protected, in this case it is not possible – on the basis of the following - for them to gain from that argument.

5.7

In this action it is established that (i) VEOB et al. are unable to bring the actions brought in these proceedings directly with ILOAT or via another judicial process made accessible by EPOrg, (ii) but that employees of EPOrg can challenge measures taken against them by EPOrg by using an internal procedure at EPOrg followed by a judicial process with ILOAT, and within that framework they can also raise for discussion the legitimacy of the decisions on which the measures are based, (iii) EPOrg staff representatives can complain to ILOAT about rules of general scope that concern all employees jointly and which do not require any implementation in individual cases, and (iv) with the judicial process via ILOAT, insofar as this concerns the EPOrg employees and staff representatives, EPOrg has provided a judicial process that meets the requirements set for this.

5.8

Insofar as VEOB et al. have based their claims in these proceedings on the right to collective action, the following is considered. Via an internal procedure at EPOrg, followed by a judicial process at ILOAT, the members of VEOB et al. have the possibility to challenge the measures taken against them, and in that framework they can also challenge the decisions on which those measures are based. Partly considering that which is considered with regard to this in 4.2, 4.3 and 5.5, these possibilities, although they are inferior to those under national law, are deemed to be a sufficiently reasonable alternative for being able to effectively protect the right to collective action arising under Article 11 paragraph 1 of the ECHR.

A means of recourse that can only be used after the breach has occurred cannot simply be regarded as being non-effective (cf. European Court of Human Rights 20 January 2011, No. 36036/04, Makedonski, ground for the decision 56; European Court of Human Rights 27 October 2016, No. 55977/13, NDP/Germany, ground for the decision 23). The fact that the members of VEOB et al. can only challenge the provisions adopted by EPOrg subsequently, in other words after the measures have already been taken against them, which VEOB et al. have raised for discussion in these proceedings, still does not mean that the means of recourse available to them is not a sufficiently effective means of recourse in the sense of Article 13 of the ECHR.

5.9

Insofar as VEOB et al. have based their claims in these proceedings on the right of collective negotiation, these fail because VEOB et al. – considering the reasoned challenge to these by EPOrg, partly on the basis of the legal precedents of ILOAT as cited in the court documents – have been unable to argue sufficiently that the staff representatives have inadequate possibilities to challenge that right with ILOAT. In this context it is important that Article 34 paragraph 1, first sentence of the Service Regulations stipulates that the staff representation represents the interests of all staff ("The Staff Committee shall represent the interests of all staff"). Furthermore, it is worth noting it is evident from the preamble of the Service Regulations that EPOrg has explicitly committed itself to ILOAT to regard human rights ("The Administrative Council and the President of the Office note that when reviewing the law applied to EPOrg staff the ILO Tribunal considers not only the legal provisions in force at the European Patent Organisation but also general legal principles, including human rights.").

On the basis of this it must be assumed in these preliminary relief proceedings that it cannot be said that the judicial process via ILOAT that has been made available to EPOrg's staff representatives means that VEOB et al. do not have access to a sufficiently reasonable alternative for the effective protection of the right of collective negotiations invoked by VEOB et al. on the basis of Article 11 paragraph 1 of the ECHR.

5.10

The conclusion is – unlike the Court of Appeal has ruled – that in this case it cannot be said that the protection of the rights guaranteed by the ECHR, however fundamental this may be, is manifestly deficient within EPOrg and that EPOrg's invoking of the jurisdiction immunity it has been granted is disproportionate. The Court of Appeal – like the court in preliminary relief proceedings – has wrongly rejected the EPOrg's invoking of jurisdiction immunity.

5.11

The disputed ruling cannot be upheld. The other complaints regarding the means of recourse do not need to be heard.

5.12

The Supreme Court can settle the case itself. Because EPOrg can invoke its jurisdiction immunity against VEOB et al., as granted to it by virtue of Article 3 of the PPI, the Dutch courts have no jurisdiction with regard to the claims made by VEOB et al. against EPOrg.

6 Decision

The Supreme Court:

sets aside the ruling of 17 February 2015 made by the Court of Appeal in The Hague;

sets aside the ruling of 14 January 2014 made by the court in preliminary relief proceedings at the law courts in The Hague;

declares that the Dutch court does not have jurisdiction to examine the claims of VEOB et al. against EPOrg;

orders VEOB et al. to pay the costs of the actions, estimated to the date of this ruling at:

- in the first instance on the side of EPOrg at € 1,405.00;

- on appeal on the side of EPOrg at € 3,386.00;

- in cassation on the side of EPOrg at € 952.37 for disbursements and € 2,600 for fees, and on the side of the State at € 848.34 for disbursements and € 2,600 for fees, and in the procedural issue on the side of EPOrg at € 68.07 for disbursements and zero for fees, and on the side of the State at € 68.07 for disbursements and € 800 for fees.

This ruling was made by the Vice-President F.B. Bakels as Presiding Justice and the Justices C.A. Streefkerk, A.H.T. Heisterkamp, G. Snijders and M.V. Polak, and pronounced in open court by Justice G. de Groot on 20 January 2017.